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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN D. TURNER

Petitioner

versus

Financial Corporation of America

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner
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QUESTIONS PRESENTED

In a summary judgment proceeding did the Ninth Circuit err when holding,

> "Reliance by investors, on publicly available information is presumed for purposes of a rule 10b-5 action."

And if an investor trading in the market is constructively on notice of media stories he did not read then did the lower courts err by weighing the evidence in this case when deciding to grant and uphold summary judgment barring Petitioner from his day in court before a jury on the merit?

When an individual investor relies primarily upon 10-K and 10-Q reports in making his investment decisions is it error for the court to grant summary judgment based substantially upon its holding that selected media stories gave the marketplace, and thus, constructively the individual, a true picture of a company's financial condition?

PARTIES TO THE PROCEEDING

AND RULE 29.1 LIST

Petitioner is John D. Turner.

Respondents Are:

Financial Corporation of America, A Delaware Corporation; American Savings and Loan Association, A California Corporation; William J. Popejoy; Victor H. Indiek; Merril Butler; Robert M. Barton; Thomas P. Kemp; Annelise G. Anderson; J. Ralph Stone; Charles E. Young; Edwin L. Johnson; Lawrence K. Roos; Donald E. Royer; Niel N. Stolz; Peat Marwick, Mitchell & Company; Does 1 through 99.

The Federal Deposit Insurance Corporation entered this case as receiver for American Savings and Loan Association in September, 1988.

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Petitioner

——v.——

FINANCIAL CORPORATION OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner John D. Turner respectfully petitions for a writ of certiorari in the above entitled matter citing the overriding national interest in having a consistent application of securities law throughout the district and circuit appellate federal

courts. And a consistent application of the standards to be applied by the lower courts in granting summary judgment.

Petitioner John D. Turner respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit which upheld an order of the United States District Court, Northern Division, granting of summary judgment to respondents and dismissing this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1a-21a)[1] is not reported. The Opinion of the Court of Appeals, denying a petition for rehearing. (App. 22a) is not reported.

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[1] References to "App." are to the Appendix submitted with this petition.

The opinion of the United States District Court for the Northern District of California granting summary judgment to Respondents (App. 25a-51a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1992 (App. 23a) Rehearing was denied in a split decision by an order dated April 1, 1992 (App. 22a). This Court's jurisdiction is invoked pursuant to 28 U.S.C.§ 1254(1).

STATUE AND RULES INVOLVED

The statue and rules involved in the proceeding are section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j; Rule 10b-5, 17 C.F.R. § 240.13c101; and Rule 56, Federal Rules of Civ. Procedure (App.235a-238a)

STATEMENT OF THE CASE

This individual action, alleging violations of Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5, violations of RICO 1961-1968, and common law violations was commenced in April, 1988 against Financial Corporation of America, ("FCA") a Delaware Bank Holding Company and certain of it's corporate officers and directors of both FCA and American Savings and Loan of Stockton, ("American") a 98.5% wholly owned subsidiary of FCA.

FCA was listed as a Fortune 500 Company at all times during the periods covered by this action.

Petitioner's complaint alleged that Respondents led by Popejoy, who took over as the Chief Executive Officer of American and FCA in August 1984, discovered in the last half of 1984, through November of 1985 that a significant portion of the company's

loan receivable and its investment assets were generated through a general practice of fraud and were improvident and likely to cause continuing losses to the company.

Petitioner claimed that rather than report these findings to the S.E.C., the market and the shareholders, Respondents led by Popejoy filed false and misleading 10-K and 10-Q reports with the SEC for 1985, 1986 and 1987, which reports Petitioner relied upon in making his investment decisions.

Respondents claim they reported, by providing for the financial impact of these discoveries, when they set aside $422 million for loan loss reserves for year-end 1984.

Petitioner alleged that there was no disclosure by respondents of the general practice under the former management of FCA to originate assets through fraudulent practices. And that this hard fact was a

material fact that any reasonable investor would want to consider before making an investment decision in respect to this troubled company which was represented by respondents, led by Popejoy, as a turn around Company on track to full recovery.

Petitioner also alleged that a significant portion of the losses FCA experienced were from these phantom assets, and that the actual losses were far in excess of $422 million. In fact as high as $4 billion dollars. Yet these assets were being carried as solid assets to comprise a significant portion of the $14.9 billion dollars FCA reported as loan receivable assets in its 1985 10-K.

Petitioner presented probative evidence that Financial Corporation of America ("FCA") was insolvent at all times during this period. The San Francisco Federal Home Loan Bank (SF-FHLB) had in their files (of significant case writeups)

that the FCA case was expected to cost the Federal Deposit Insurance Corporation ("FSLIC") $4 billion dollars to resolve.

Yet at this same time FCA was progressively reporting net stock-holder equity up from $229.7 million progressively up to $320 million during six successive quarters from year end 1985 through June 1987, in their 10-K reports to the SEC.

Petitioner Turner accumulated 90,000 shares trading on the New York Stock Exchange during this period beginning April 23, 1986 through April 14, 1987, at an average price of $9.07 per share and a total cost of $816,125.

In 1988 FCA's primary asset, American Savings, was seized by the FHLBB and turned over to the FSLIC as receiver. American was immediately sold in a pass through sale to Robert Bass and the FHLBB reported that FSLIC would lose $1.7 billion after factoring in that the FHLBB kept a 30%

interest in the new entities which were New West Savings and the new American Savings.

Respondents filed motions to dismiss Petitioner's complaint. Petitioner answered and a short hearing was held in which the district court told petitioner:

THE COURT: "Why are you here? Why don't you leave it to the attorneys in Los Angeles who are litigating on behalf of the class? I am not going to try a parallel action up here when there is one down in L.A." P4-L16

The court then turned the motions to dismiss into a summary judgment procedure instructing that petitioner Turner be deposed by respondents to flesh out his claims and to search Lexis and Nexis reports to see what was in the media about FCA and to come back with motions "recharacterized" as motions for summary judgment.

On May 7, 1990, the District Court granted respondents' motion for summary judgment dismissing this action in its entirety. On February 21, 1992, the Ninth Circuit upheld the District Court's grant of summary judgment.

A. THE FACTS

As set forth in the opinions of the Courts below, the pertinent facts are as follows: The District Court's Memorandum and Order held that:

"Charles Knapp resigned and was succeeded by William Popejoy as Chief Executive Officer of American in August 1984. Popejoy engaged an independent task force to determine the adequacy of loan loss reserves for the loans created during the period of Knapps management. "Such loans were alleged to have been made under inadequate or fraudulent banking practices". Upon completion of the task

force's review the loan loss reserves were increased by $422 million. This fact was reported in FCA's 1985 10-K submitted to the SEC on March 31, 1986. The 1985 10-K report also revealed that periodic reviews of the loan loss reserves would take place. The 10-K mentioned the ongoing litigation resulting from Charles Knapp's loan making activities during his tenure at American." (App.27a)

The Ninth Circuit Memorandum held that: "Before buying stock in 1986, Turner reviewed FCA's 1985 10-K, which revealed several financial problems: 1) Loan loss reserves had been increased by $422 million as of the end of 1984 and $182 million as of the end of 1985, 2) the loan portfolio was being investigated, and 3) FCA was being sued in various shareholder class action suits arising out of the activities of the management which headed the company

until 1985. Those suits were subsequently settled for between $32 and $42.7 million. Several stock reporting services, including one that Turner subscribed to, reported FCA as a "risky investment," giving it the lowest safety rating." (App. 3a)

B: THE DISTRICT COURT'S DECISION

Page six (6) of the District Court's Decision the court states "From the numerous exhibits submitted, it appears that the information available in the marketplace, both before and during Plaintiff's purchases, was sufficient to give plaintiff an accurate picture of FCA's financial condition. Two of FCA's alleged omissions were reported by prominent financial publications prior to and during the time plaintiff purchased stock. The fact that American was the subject of a takeover, or that a buyer was being sought for it, was well documented in the press.

The remaining two omissions alleged by plaintiff, pertaining to the understated amounts of loan loss reserves and fraud mentioned in FCA's proof of loss statement, may also be deemed immaterial amidst the amount of information available concerning FCA's financial condition and history. (App.34a)

C: THE COURT OF APPEALS DECISION

The Ninth Circuit held:

"The statements that Turner claims are materially misleading are Popejoy's opinions or belief's regarding the present and future of FCA. That kind of statement may be actionable if knowingly false...Even if we assume that the statements were knowingly false, Turner's claim fails because he was exposed to such a morass of contrary information that it was not reasonable for him to rely solely on Popejoy's optimistic statements as evidence

that all the other available information was inaccurate ...Reliance upon publicly available information is presumed for purposes of a Rule 10b-5 action...The causal connection between Popejoy;s statements and Turner's purchases and losses is missing in this case. At the time of Popejoy's statements, the papers were filled with news of FCA's financial difficulties and its previous unsound lending practices. In 1985 the New York Times called FCA "the most explosive, speculative stock on the New York Exchange." (App. 8a-10a)

Citing points of material fact overlooked in the memorandum of decision Turner petitioned the Ninth Circuit Panel for a rehearing. Judge Noonan voted to grant the petition, Judges Nelson and Fernandez voted not to grant the petition. Final Judgment was filed April 23, 1992. (App. 22a-23a)

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ERR WHEN HOLDING AN INDIVIDUAL CONSTRUCTIVELY ON NOTICE OF MEDIA STORIES HE DID NOT READ.

The standards applied below are essentially "caveat emptor", creating an unworkable standard, not justified by policy or precedent and, as here likely to result in an unjust decision.

This is an error in application of the standard adopted in TSC where this court held the general standard of materiality is full disclosure, and not "caveat emptor", to the "reasonable investor". The TSC standard, expressly adopted by the U.S. Supreme Court in Basic v. Levinson, 485 U.S. 224 (1988), defined materiality as facts where there is:

"a substantial likelihood, that, under all the circumstances, the omitted fact would have assumed actual significance in

the deliberations of the reasonable shareholder. Put another way there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available." TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

FCA's very survival depended on its assets. The rule of this court is that Turner be informed of all material facts that a reasonable risk taker would want to consider before taking a risk.

A. THAT A COMPANY'S ASSETS WERE GENERATED IN A GENERAL PRACTICE OF FRAUD IS MATERIAL INFORMATION.

Media stories that warn that FCA has a large number of foreclosed property and non performing assets is NOT a disclosure that FCA had a large number of assets which were

generated under a general practice of fraud. Especially when FCA continued a steady stream of reports delineating these losses as due to economic conditions in oil patch and agricultural communities. (App. 79a; 216a)

Petitioner does not argue that investment in FCA stock was not risky. The question was: what was the risk? Was it economic or was it economic, compounded by fraud so pervasive that the company was always insolvent if the facts were told.

Any investment in a turn around company is a special class of investment representing a special risk. But to hold that FCA's true financial condition was known to the market place from media stories requires that the market be aware of the following probative evidence submitted by Petitioner Turner. Which, incredibly, the lower courts rationalized away as immaterial: (App. 191a-198a)

a) Secretly there was a known $2 to $3 billion hole in the FCA/American by both the Federal Home Loan Bank Board (FHLBB) and the San Francisco Federal Home Loan Bank (SF-FHLB) during the time that Turner was buying stock and during which time the company was reporting on its 10-Q and 10-K reports rising net assets each quarter. FCA reported net stockholder equity of $229.7 million December 31, 1985 with each quarter increasing to $276.2, 284.8, 293.6 million respectively and 313.9 million December 31,1986 Then 320 million as of May 11, 1987.

b) The FHLB-SF had in its files a significant case writeup estimating a cost to the FSLIC of $4 billion dollars to resolve the FCA Case during the year Turner was buying stock in a company he thought was told had stockholder equity of between $229 and $320 million and was improving each quarter.

c) The Respondent Officers and Directors were secretly indemnified by the FHLBB in 1985, against loss from serving as officers or on the companys' board of directors, and those indemnification agreements were not disclosed to the shareholders at any time.

d) In November 1989 the chairman of the Federal Home Loan Bank, M. Danny Wall, testified under oath before the house banking committee that when he took over as chairman in June of 1987 he discovered that American had a known $2 to $3 billion dollar hole in it, was being run out of the FHLBB's offices in Washington D.C., and that he immediately began to undo that.

Respondents submitted a total of six media stories. Not only do these stories not disclose the above they do not even hint of it. Nor do they disclose at a time when petitioner bought stock He was buying stock in a company whose loan portfolio was

comprised of assets, a significant portion of which were generated under a general practice of fraud. These assets were so impaired that no amount of effort could turn them into solid assets. (App 92a-131a)

Unless the phantom assets, (originated through the fraud and improvidence outlined in the "Proof of Loss"), were counted as solid assets and a part of FCA's $14.9 billion dollar loans receivables FCA was always insolvent by several billion dollars. (App. 163a-190a)

After extensive hearings a report was released April 9th., 1987 by the Sub-committee On Oversight and investigations of the Committee of Energy and Commerce U.S., House of Representatives, exploring the activities of the FHLBB in connection with enforcing securities laws. Petitioner presented the report as evidence.
"The subcommittee found that the FHLBB has engaged in a persistent pattern of inaction

and non-enforcement, and, when that was not enough, in deliberate actions which culminated in misleading financial reports and apparent violations of securities laws." (App. 229a-234a)

Common sense is insulted when such evidence rationalized away. Further, the Lower Court's confusing Media Mix Theory of disclosure leads to an impossible situation where no investor could ever rely on any SEC required report without being constructively on notice of everything ever written or spoken in any media channel.

This would be an impossible standard to meet and would effectively do away with the need for any SEC report, replacing it with a media mix report. To accept this standard means that no investor could rely upon anything reported in a 10-K form without knowing everything ever written in all major media channels as a delimiter.

As in this case, this standard leads to a quagmire of whose interpretation is correct of what the media mix is comprised. It would be a field day for litigation attorneys and experts but not effective for a fair and honest securities market.

Further such a standard is an improper legislation by the court that dispenses with the process instituted by congress and expressly provided as a medium an investor is entitled by law to rely upon, i.e. the SEC 10-K and 10-Q report.

The standard for requiring truth is higher in a 10-K or 10-Q which requires reporting the hard facts -- whereas media reports are comprised of soft information and the opinion of the writer. Further the media is notoriously unreliable and not generally liable to an investor, under SEC laws, for reporting errors.

In Aaron v. SEC, Justice Blackmun stated "I have no doubt that the "mischief" -

confronting congress in 1933 and 1934 included a large measure of intentional deceit and misrepresentation. The concern, however, ran deeper still, and congress sought to develop a regulatory framework that would ensure a free flow of honest, reliable information in the securities markets. This court has recognized that it was congress' desire to "substitute a philosophy of full disclosure for the philosophy of caveat emptor," and to place upon those in control of information the responsibility for misrepresentation. (citations omitted)" Aaron v. SEC, U.S. 446 at 706-707

Adopting a standard requiring an investor to beware of media stories is essentially a standard of caveat emptor rather than this courts TSC rule requiring full disclosure in an appropriate forum such as a 10-K company release. Further, reasonable minds could differ on what even

the few selected media stories disclose.

Financial Corporation was officially touted as a turn around company by Respondent Popejoy, its Chief Executive Officer, in a September 22, 1986 article in American Banker where he stated:
"We're out of harms way in my estimation" he said. "There's no longer any talk of American Savings [Financial Corp.'s savings and loan subsidiary] failing. It's just how long it will take for this company to fully regain the financial prominence it did prior to the FCA First Charter Merger in 1983."

This article was reprinted and sent out to shareholders as an official FCA Press Release on October 28, 1986 where shareholders were told:
"We thought you'd be interested in Bill Popejoy's recent interview although we'd like you to know that the FCA news release contains updated information that was not

available at the time of the interview. In particular , please note that FCA has now produced five consecutive quarters of profitability, and that American Savings' regulatory capital has increased to $527.6 million..." (App. 132a-162a)

To hold that such statements in an official Company press release by the Chief Executive Officer of a turn around company would not influence the decision of an investor or speculator to trade defies common sense. Further this was released in October 1986, a full year later than the two October 1985 New York Times articles, and three months later than the last article which the lower courts allege constructively warned the Petitioner of FCA's true financial condition. (App. 92a-131a)

The District Court's rulings rationalize away the above as immaterial to petitioner Turner by a finding that:

"Plaintiff has offered no proof indicating that Popejoy made those statements under such circumstances. "General statements of optimism are ordinarily not actionable as 10b-5 material misrepresentations unless it can be shown that the speaker had no reasonable basis for making the statement or was aware of some undisclosed facts. (Citation omitted) Moreover, such statements are incapable of being branded as material misrepresentations since there was an abundance of public information detailing FCA's financial condition."

The Ninth Circuit held that:

". . . in making his optimistic statements Popejoy may have really believed what he was saying was true." (App. 9a)

The courts first hold that Turner had no reasonable basis to believe Popejoy because of information in the marketplace. Then hold that Popejoy may have reasonably believed what he was saying. Yet Popejoy

had all the same market information as Turner - plus he had inside information that a significant portion of the companys' assets were generated in a general practice of fraud expected to cost the FSLIC $4 billion dollars. Popejoy had no reasonable basis for making such claims since he knew what Turner and the market did not know.

This is only one of many instances of the courts below wrongly viewing evidence in a light most favorable to the party moving for summary judgment.

Further, Turner did not rely solely on Popejoy's optimistic statements. His statements were only part of a composite of all the company's reports which misled not only Turner, but also the market.

This conflict between the materiality standards of this Ninth Circuit ruling and the standards this court set forth in TSC presents an issue of major importance in the orderly administration of the federal

securities laws. Uncertainty respecting what defines materiality resulting from the decisions below should be clarified by this court. This case presents an opportunity to clarify this issue in a framework provided by an individual investor trading in the market in reliance on 10-K reports. A majority of cases addressing this issue have been class action cases.

II. THE DECISIONS BELOW DIRECTLY CONFLICT WITH THE FRAUD UPON THE MARKET THEORY WHICH HAS BEEN ADOPTED BY THIS COURT AND EIGHT OF THE CIRCUITS WHO HAVE ADDRESSED IT.

The standard established by the courts below cannot withstand careful scrutiny.

This court, and all circuits to address the issue, had already certified a market expert to instruct the district court as to what the media information meant. That expert was the secondary market for securities made by the New York

Stock Exchange. It was the best arbiter of what the total mix of media information about FCA meant. In this case it meant that based upon all positive and negative public information the stock was worth the asking price and the price paid.

In trading on the New York Stock Exchange Petitioner Turner can be said to have relied upon the integrity of the market in certain basic assumptions.

1) That there was a market for the security at the price offered and sold.

2) That the market knew of no reason why the stock was not worth the asking price.

3) That, the efficient market had assessed all public information, in valuing FCA stock at the price he paid.

4) That he was trading in an honest market.

If it was not unreasonable for the market to value FCA stock at the market price based upon all public information

including all negative media then it cannot be unreasonable for Turner to have valued it at the market price he paid when he purchased in the market. And the lower court commits serious judicial error when it grants summary judgment and supports that order by weighing selected soft media story evidence and subjectively holding what a limited number of media stories constructively disclosed to Turner. "Under the fraud on the market theory, which has been adopted by every court (including eight courts of appeal) to address it, it is presumed that every material corporate misstatement was reflected in the market price of the security and that investors, in making a decision to trade, relied upon the integrity of the market price and thus relied indirectly upon the misstatement." SEC Amicus Brief page 2 (1987) Basic v. Levinson, 485 U.S. 224.

The Ninth Circuit led in the development of the fraud on the market theory with Blackie v. Barrack, 524 F.2d (1975). This Court has since firmly established that the securities market is not comprised of fools and that in a well defined market -- that market has absorbed all available public information and has intelligently reflected it in the price of the security being traded.

In Turner vs FCA the lower courts reverse Blackie and overrule the U.S. Supreme court by in effect holding that Petitioner Turner, who bought at the market price, was unreasonably purchasing in light of what the lower court decided the media reports and the 1985 10-K, were telling him, and by inference telling the market.

In arriving at this conclusion Judge Marilyn Patel sitting in the district court solicited the defendants to search and provide the court with Lexis and Nexis

reports of what was in the media before, during and after the period Turner was buying. Respondents selected six of the worst stories. Judge Patel selectively picked and chose from that information (two written seven months before Turner began to purchase) in arriving at a decision that Turner was constructively on notice of materials he never read and that Turner was unreasonably buying in face of what was in the media and the marketplace; Judge Patel holding that media stories adequately informed Turner of FCA's financial condition. (App. 34a-35a)

If Turner was constructively on notice and adequately informed by information in the marketplace from the media stories submitted by respondents then it must also follow that these same media stories had also adequately informed the market of FCA's true financial condition.

Yet the market continued to trade FCA common stock for the year that Turner accumulated at a price of $9 dollars on 6/13/86 gradually down to $7.00 by 10/23/86 then reversing and gradually up to $10 by 1/23/87 then gradually down to $7 by 4/23/87. The average price being $8.75 for 67,172,100 shares that traded in the 249 trading days (an average of 269,767 shares per day). (App. 199a-208a)

The logical question becomes:

"Why would the market value an insolvent company with a $2 to $3 billion dollar hole in it at those prices?" if, as held by the courts below, the total mix of information, including media stories, accurately disclosed FCA's true financial condition?

For a District Court Judge to interject selected soft information contained in media stories into a summary

judgment procedure, for the sole purpose of holding Turner constructively on notice of selected negative information, alleged to be what is contained in such stories, is serious judicial error.

The District Court's memorandum states: "The [Turner's] other purchases took place despite a plethora of information existing in the market place tends to indicate that plaintiff was relying more on the greater fool theory...than any optimistic picture of FCA painted by Defendant Popejoy." (App. 43a)

Respondents' "greater fool" theory has no foundation in law as a general defense. It must rest upon fact. Fact finding is a jury function.

If the lower court is ruling that Turner was a fool for buying at the market price in light of information available in the marketplace then the lower court must

also be ruling that the market was a fool for buying the other 67 million+ shares which also traded at an average price of $8.75 during the same year. (App.199-208a)

However a reasonable jury might hold that a clearer statement was that the market was defrauded along with petitioner Turner -- since it is legally presumed that the market had all information, including all the selected negative information cited by the courts below, intelligently processed into the price of FCA securities.

Yet a majority on the split ninth circuit panel erroneously bought into the labyrinth of rationalizations used by Judge Patel to support her ruling. This rational cannot with-stand scrutiny when reviewed in light of the established stare decisis under the fraud on the market theory.

Also, contrary to the District Court's new "Greater Fool" theory, it does not follow from efficient market theory that

the market price of common stock is moved by fools. The stock market cannot be equated with a single investor. Rather, the market embodies the collective wisdom of thousands of traders, with prices typically determined by the bargains struck between the most sophisticated of those traders. See Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826,835 (7th Cir. 1985) ("[t]he price of an actively traded stock reflects the value placed on it by the professional investors who follow a firm closely"). Such traders take into account all information about a stock, but reject much of it as inaccurate, unreliable, or contrary to better intelligence.

The other basic feature of an efficient market is that the market is quick to correct its mistakes. If the price of a stock becomes distorted, traders frequently step in to buy the undervalued stock or sell the overvalued stock until

the proper price is restored. See T. Copeland & J. Weston, Financial Theory and Corporate Policy 211 (1979) ("[c]apital market efficiency relies upon the ability of abitraguers to recognize that prices are out of line and to make a profit by driving them back to an equilibrium value"). Spurred by the incentive to maximize profits or minimize losses, sophisticated traders compete intensively to ferret out information about underlying events and values.

Based upon an efficient markets best efforts to ferret out information about FCA from all the information available to it from August 31, 1984 when FCA Stock traded at $5, through the days, weeks and months, and for the entire year of 1985, up to and including March 31, 1986, as the stock price continued to rise until it traded at $17, The efficient market made a price, upon the New York Stock Exchange, on FCA

stock, a Fortune 500 Company. This market assimilated the 10-K and 10-Q Reports filed by FCA, and the statements of Defendant Popejoy about its recovery. Further it had assimilated all the news stories referred to by the lower courts, magazines, advisory services, and all other media reports written about FCA during that time.

Also when FCA began to fall from the $17 high on March 31, 1986 it fell after FCA announced additional loan loss reserves due to falling real estate values in condominiums the company owned which were revalued as apartments. This was an economic condition not losses due to fraud. The market still assumed that FCA had sound assets which it had thoroughly examined but was continuing to experience losses due to economic conditions. (App. 79a; 216a)

"See Lipton v. Documation,Inc. 734F.2d 740,748 (Call 1984), cert. denied, 469 U.

S. 1132 (1985). The presumption is also supported by common sense and probability. Recent empirical studies have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations. It has been noted that 'it is hard to imagine that there ever is a buyer or seller who does not rely on market integrity. Who would knowingly roll the dice in a crooked crap game?' Schlanger v. Four-Phase Systems Inc. 555 F.Supp. 535, 538 (SDNY 1982). Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed."

"In an open and developed market, the dissemination of material misrepresentations or withholding of material information typically affects the price of the stock, and purchasers generally rely on the price of the stock as a reflection of its value"; Blackie v. Barrack, 524 F.2d 891, 908 (CA9 1975) ("[T]he same causal nexus can be adequately established indirectly, by proof of materiality coupled with the common sense that a stock purchaser does not ordinarily seek to purchase a loss in the form of artificially inflated stock"), cert. denied, U. S. 816 (1976).

And if, as Turner alleges and the probative evidence supports, it was secretly known to respondents that these assets were worth $2 to $3 billion dollars less than they were being carried for on FCA's books then it follows that FCA was bankrupt at all times and the price of FCA

stock was artificially inflated when reflecting a value of $7 to $10 dollars per share during the year that Turner accumulated stock. In fact, if Turner's allegations are true then rather than a net stock holder equity of $229 up to $320 million in the consecutive periods reported, at all times FCA had a negative net worth of between $2 to $3 billion dollars, and the stock was worthless. (App. 191a-198a)

The facts as now revealed show this was true since the FSLIC admitted a loss to its fund of $1.7 billion after seizing American and selling it in a pass through sale where their loss was computed after factoring into their admitted loss the fact that they kept 30% of the ownership.

The efficient market never got the true facts so it steadily down valued FCA common stock, with each report of losses due to whatever FCA reported. FCA reached .08 cents per share after FCA filed bank-

ruptcy in 1988. Prima facia evidence that the market works and does not value a stock at $7 to $10 dollars a share based upon "the greater fool theory" as rationalized by the lower court in its order as a possible reason for Turner's purchases.

III. THE COURTS BELOW FAILED TO FOLLOW THIS COURTS RULE THAT THE RECORD MUST BE READ AND THE EVIDENCE VIEWED IN A LIGHT MOST FAVORABLE TO THE PARTY DEFENDING AGAINST A SUMMARY JUDGMENT MOTION.

Judge Patel's memorandum cites case support for the very thing she denied Turner. As she held in her own memorandum, "The inference to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. T.W. Elec. Serv., 809 F.2d at 631." (App. 31a)

And if that rule were followed, as

shown above, she must find that the total mix of media stories favors Turner's interpretation of what they meant. Turner bought at a market price arrived at after the market assessed the media stories and had placed a value on FCA stock. A reasonably jury could find that not only was Turner not constructively informed of what Judge Patel interpreted the selected media stories to say, but also the market was not informed of what Judge Patel interpreted the stories to say.

As the Supreme Court held in TSC Industries a determination of materiality presents mixed questions of law and fact. Thus, it would be a rare case when " 'reasonable minds cannot differ' on the question of materiality" to the extent that it could be established as a matter of law on summary judgment. 426 U.S at 450 (quoting Johns Hopkins University v. Hutton, 422 F.2d 1124, 1129 (4th Cir.

1970), cert. denied, 416 U.S. 916 (1974)).

The Ninth Circuit argument fails to explain why FCA stock price trippled between 1985 and 1986 if its financial condition was accurately known to the market; or the market price of FCA during the year that Turner was purchasing. Also why they are not violating this courts rule that a judge is not to weigh evidence in a summary judgment proceeding.

Further; the Memorandum and Order of the Lower Courts clearly shows that the Court extracted only those parts of the media stories that could be viewed as negative to petitioner Turner's case. The full context of the risky-lowest safety rating disclosure, for example, is:

"These Shares are risky. FCA's loan portfolio favors fixed rate mortgages by a ratio of almost nine to one. A continued low interest rate environment could drive

earnings to near record levels and lead to exceptional capital gains by decades end. Conversely the consequences of a sudden surge in interest rates (which we're not forecasting) could be devastating . . ." (App. 209a-212a) (App. 3a; 11a)

This services' lowest saftey rating was because of the risk of interest rates rising. The Service did not say there was a risk was that FCA has a portfolio of fraudulently generated assets comprised of improvident loans and improvident transactions, made with full knowledge that the projects would not support themselves economically and with interest rate reserves paid in advance to stretch out to the future the expected foreclosures. Transactions requiring a daisy chain of subsequent improvident transactions for years as they struggle to turn these fraudulent assets into real assets or to dispose of them in "cash for trash"

transactions. (App. 163a-176a)

The net effect of the lower courts rule is if the stock is a "risky" investment an investor is not entitled to all material facts to assess them before making investment decisions.

The lower courts err in this case by viewing the evidence in a light most favorable to the party moving for summary judgment -- in direct opposition to this courts rule that the evidence be viewed in a light most favorable to petitioner, who was defending against summary judgment.

The message is clear; the party who defended against the motion for summary judgment will have the advantage of the court's reading of the record in the light most favorable to him, will have his allegations taken as true and will receive the benefit of the doubt when his assertions conflict with those of the movant. Bishop v. Wood, 1976, 96 S. Ct.

2074, 426 U.S. 341, 48 L. Ed. 2d 1076.

IV. THERE IS DIRECT EVIDENCE OF BIAS BY THE DISTRICT COURT AFFECTING PETITIONERS' CONSTITUTIONAL RIGHT TO DUE PROCESS. THE APPEALS COURT ERRONEOUSLY FAILED TO ADDRESS THIS QUESTION OR TO RULE ON IT.

The transcript of the September 18, 1989 hearing on the motions to dismiss set the tone for the gauntlet Petitioner has been forced to run while trying to use the justice system to redress his claims against respondents.

THE COURT: "Why are you here? Why don't you leave it to the attorneys in Los Angeles who are litigating on behalf of the class? I am not going to try a parallel action up here when there is one down in L.A." P4-L16

THE COURT: "Why should you do any better

than any other member of the class?"
P5-L1

MR. TURNER: "Well, I claim that this class action settlement is not for the benefit of the shareholders at all. It's for the benefit of the FSLIC and the Federal Home Loan Bank, all of whom are having themselves exempted and indemnified or released by this class settlement." P5-L3

THE COURT: . . . "It doesn't make sense to allow one shareholder to run off and be litigating and running up the cost of litigation for the court and the parties when that person is a member of a class. Have you opted out of that class?" P5-L21

THE COURT: . . ."I think probably the best way to get to the heart of this case and the soonest, most expeditious is to have you take the plaintiff's deposition and pin

down exactly what representations he does claim he relied on and get the kind of specificity that is necessary.

Find out whether his reliance was reasonable, and all those other good things that you need to know in order to know if there are valid claims here. And then come back here with motions that really, I guess, should be recharacterized as motions for summary judgment." P13-L1

Petitioner certainly agrees that it would be more convenient to read the record in a way that doesn't let one lone share holder "run off and run up the cost of litigation" when there is a class action he could join. However our system of justice is at its finest when protecting individual rights guaranteed by our constitution. Convenience and/or expediency for the Court is secondary to an individual's right to a fair procedure in a federal court.

Petitioner's 7th amendment rights to use the justice system to have his case heard upon the merit by a jury are severely strained, if not broken, when the courts below interject themselves between him and his day in court by subjective interpretations of what was in the marketplace or what selective media information disclosed when the engine that fueled such finding may have sprung from judicial bias.

Enforcing this posibility -- the respondents were given court ordered discovery to develop their media report theory of the case. Petitioner Turner was denied discovery and could not develop and perfect the probative evidence he had submitted.

We do not have two drinking fountains of justice, one for a politically correct case and one for cases where the FHLBB finds itself in such a bind from the fraud and abuse in the S&Ls that it regulates that it conspires to keep the largest S&L

open and operating (and its stock trading) even though it is insolvent, issuing letters that misled the market for over 3 years, allowing thousands of innocent securities purchasers to believe the S&L had $320 million net worth when it was secretly known to have a "$2 to $3" billion dollar "hole in it".

For the courts to strictly enforce securities law is just and moral. Judicial activism serving to protect malfeasance by the FHLBB is neither just or moral.

V. THE MEMORANDUMS OF THE LOWER COURTS CONTAINS SUCH EGREGIOUS ERROR THAT IT OFFENDS JUSTICE TO ALLOW IT TO STAND.

The District Court held "In addition plaintiff claims the losses as demonstrated by the proof of loss far exceeded defendant's disclosures. This is not supported by the proof of loss, however. The total

of the sums referred to in the document is sub-stantially the same as the amounts revealed in the 10-K and the public disclosures. Thus, plaintiff's alleged reliance on the Proof of Loss statement is unconvincing since such omissions cannot even be proven to have existed."
(app. 38a)

However Petitioner presented an example of one loan he knew about. That "Cannery Row" Loan had a loss reserve of $2.5 million July 1, 1987 and $21.4 million a year later after American was seized and sold to Bass. So it jumped from 2.5 million to 21.4 million in a year - simply a question of when you decided to take out a pen and write it down to the value you always knew it to be. This was only a $42 million loan to start so they lost interest and one-half the principal. (163a-190a)

"This loan, listed in schedule 2 under

Improvident Loans, page 4, [hand numbered 136] as "Rossi (cannary Row). Loan Number 020-1006563. Total loss/loss reserve through 1985, $750,000. Yet the loss was $21 million. If one used this under report of losses as a templet for the entire portfolio of improvident loans the actual losses would be multiplied by the factor obtained from the actual $21.4 million loss divided by $750,000 reported loss. This factor is 28.5. Or the loss was actually 28.5 times the reported loss. So if all loan losses in the "Proof of Loss" were understated by the same factor the loan losses would be $422 million reported in March 1985 times the understated factor of 28.5 or a total of $12.02 billion dollars.

However from simple logic we know the additional losses to FCA above the $422 million respondents claim reported the full financial impact (if not the content) of the "proof of Loss" would be:

"a) somewhere between the $1.7 billion dollar loss that the FHLBB admitted as it seized and sold American in a pass through sale to Bass (incredibly keeping 30% of the company for itself)

b) and the $4 billion estimated in the significant case write up contained in the SF-FHLB files." (App. 194a)

Further the district court wrongly held: "The details of the Knapp management misdeeds were well documented in various financial periodicals as well as in FCA's 10K report and financial statements." (App. 37a; however See 1985 10K excerpts, App. 75a; the Proof of Loss excerpts App 162a; and generally App. 75a-234a)

From all the foregoing it can be seen that basis for granting summary judgment was improper in that the courts below

failed to carefully analyze the claims and submissions of petitioner, and the controlling legal issues. In poorly reasoned opinions they wrongly concluded, as within the meaning of Rule 56(c) Fed. R. Civ. P., that the respondents were entitled to, and granted them, summary judgment based upon incorrect findings and conclusions of law.

- The lower courts improperly weighed evidence to arrive at their decisions, which is properly the role of the trier of fact. Turner is entitled to have a jury weigh the evidence in a civil matter as provided by the seventh amendment.

- The lower courts err in holding that Petitioner was constructively on notice of the content selective media stories he did not read, in publications he did not subscribe to -- two of which were written

seven months, and one 40 days, before he even began investing in the market.

- The lower court's view of the evidence was subjective, and reasonable minds could differ as to what the evidence shows.

A petition should be granted to resolve the questions raised above so that securities law, and established stare decisis in summary judgment issues as well as securities law, is being uniformly enforced in this circuit.

Petitioner Turner's rights to a fair procedure in a federal court is the quintessential foundation upon which the judicial system is built. Preserving that right is more important to society than any benefit derived from the lower courts reading the evidence so as to protect an agency of government from accountability

for its own misfeasance and malfeasance in the S&L scandal surrounding FCA/American.

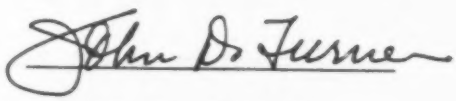
That Petitioner's suit go forward is further important to society as a necessary private action assisting in policing the securities market to insure that it remain a fair and honest market. The integrity of the securities market is at least equal to any alleged public purpose that may have been achieved by the FHLBB keeping an insolvent S&L operating for the four years American was kept open, while they tried to deal with a problem they feared would have bankrupted the FSLIC had it been required to make good on its insurance guarantees. (FCA was largest S&L in U.S.)

"Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill in its use."

If, in truth, this case has been decided through a thinly veiled agenda of judicial activism, it results in not only financial loss but a disfranchising of a citizen's constitutional rights to due process and a jury trial upon the merit, and it serves no just or good societal purpose. Petitioner is entitled to his day in court on the merits with a jury as fact finder.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.



Dated: May 27, 1992
San Jose, California

John D. Turner
Petitioner

92-83

Supreme Court, U.S.
FILED
JUN 23 1992
OFFICE OF THE CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

JOHN D. TURNER

Petitioner

versus

Financial Corporation of America

Respondent

APPENDIX

John D. Turner
Petitioner
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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN D. TURNER,

Plaintiff/Appellant

__vs.__

FINANCIAL CORPORATION OF AMERICA et al.,

Defendants/Appellees

NO. 90-15847

USDC No. C-89-2486 MHP

MEMORANDUM*

Appeal from the United States District Court for the Northern District Court of California - Marilyn H.Patel, District Judge, Presiding

Before: D.W. NELSON, NOONAN and FERNANDEZ, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

John D. Turner appeals from a grant of summary judgment in his securities fraud, RICO and common law action against defendants/appellees. The district courts' order granting summary judgment is affirmed.

I. Facts and Procedural Background

During the period between April 1986 and 1987, Turner purchased 90,000 shares of Financial Corps. of America (FCA) stock at a cost of $816,125. FCA was later taken over by federal regulators. Turner lost substantial amounts of money and attributes these loses to alleged fraudulent misrepresentations and omissions by FCA, certain officers and directors, American Savings and Loan Association ("American"), a subsidiary of FCA, and the outside accountants, KPMG

Peat Marwick ("Peat Marwick").

Before buying stock in 1986, Turner reviewed FCA's 1985 10-K, which revealed several financial problems: 1) loan loss reserves had been increased by $422 million as of the end of 1984 and by $182 million as of the end of 1985, 2) the loan portfolio was being investigated, and 3) FCA was being sued in various class action suits arising out of the activities of the management which headed the company until 1985. Those suits were subsequently settled for between $32 and $42.7 million.

Several stock reporting services, including one that Turner subscribed to, reported FCA as a "risky investment," giving it the "lowest safety rating."

After ordering that Turner's deposition be taken to flesh out his claims for reliance on the alleged misrepresentations, the district court granted defendants' /appellees' motion for summary judgment. The district court found that there were no genuine issues of material fact as to whether material misrepresentations existed or on the issue of Turner's reliance on any alleged misrepresentations. Summary judgment was also granted on the RICO claims under U.S.C. §§ 1961-1968.

II. DISCUSSION

1. Turner's deposition

Turner alleged that the district court abused its discretion in ordering that his deposition be taken instead of

allowing him to amend his complaint. Trial courts have broad discretion in promoting efficient and equitable case management. Se, In re Fine Paper Antitrust Litigation, 685 F.2d 810, 817 (3rd Cir. 1982), cert. denied, 459 U.S. 1156 (1983). The trial court did not abuse its discretion by ordering Turner's deposition taken instead of granting summary judgment based upon the pleadings.

2. Summary Judgment

We review de novo the district court's decision to grant summary judgment. In re Apple Computer Securities Litigation, 866 F.2d 1109, 1112 (9th Cir.1989), cert. denied, ____U.S. ____,110 S.Ct. 3229 (1990). Summary Judgment is appropriate where "there is no genuine issue as to

any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. Pro. 56(c); In Re Apple Securities Litigation 886 F.2d at 1112 (quotations omitted). To establish his claims, appellant must prove "materiality" and "reliance". These issues can be resolved by summary judgment "where there can be but one reasonable conclusion" as to the facts. In Re Apple Securities Litigation 886 F.2d at 1112-13.

A. Material Misstatements

Turner claims that FCA President Popejoy made material misstatements in his press releases and the company's 10-K's and 10-Q's filed with the Securities and Exchange Commission (SEC). He points to statements such as we're out of harms

way" as potentially misleading.

In Virginia Bankshares, Inc. v. Sandberg, 111 S.Ct. 2749 (1991), the Supreme Court held that knowingly false statements of reasons, opinion, or belief, even though conclusionary in form, may be actionable under § 14(a), we assume for our purposes that this analysis is equally applicable to claims made pursuant to § 10(b) for material misstatements of fact. See, Basic v. Levinson, 485 U.S. 224, 231-32 (1988).

In Basic, the Supreme Court expressly adopted the standard of materiality set out in the § 14(a) context as applicable to the § 10(b) context.

Id.

The actionable false statements in

Virginia Bankshares regarded a freeze out merger where the directors stated, in a proxy statement, that the value of the stock was high and the price was fair. The Court established a new standard for materiality, stating that "not every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow." Id. at 2760.

The statements that Turner claims are materially misleading are Popejoy's opinions or beliefs regarding the present and future of FCA. That kind of statement may be actionable if knowingly false. In Virginia Bankshares, the Court found that the directors held out $42 per share as a fair price, even though the

shares were worth $60. This case is not so simple, because in making his optimistic statements regarding FCA, Popejoy may have really believed that what he was saying was true.

Even is we assume that the statements were knowingly false, Turner's claim fails because he was exposed to such a morass of contrary information that it was not reasonable for him to rely solely upon Popejoy's optimistic statements as evidence that all the other available information was inaccurate. Reliance requires demonstration of a casual connection between a defendant's misrepresentation and a plaintiff's injury. Basic v. Levinson, 485 U.S. 224, 243 (1988). Reliance by investors, on publicly available information is presumed for purposes of a rule 10b-5

action. Id. However, this presumption may be rebutted by "any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by plaintiff, or his decision to trade at a fair market price." Id. at 248. Additionally, the presumption may be rebutted when investors would have acted in the same manner had they not relied on the integrity of the market. Id. at 249. The casual connection between Popejoy's statements and Turner's purchases and losses is missing in this case. At the time of Popejoy's statements, the papers were filled with news of FCA's financial difficulties and it's previous unsound lending practices. In 1985 the New York Times called FCA "the most explosive, speculative stock on the New York Exchange." Thomas C. Hayes, Financial

Corp.'s Climb Back, New York Times, Oct. 9, 1985, at D1, cited at ER 20.

The articles that Turner points to as being misleading because of their optimistic statements also include negative information and caution careful evaluation. For example, the article Turner used to show alleged misstatements identifies the problems with FCA. The article read, "[t]he company is out of danger, but still about three years away from being financially sound...potential decreases in real estate values, however could still result in increased additions to the reserves in the fourth quarter." Mark Basch, Financial Corp.s Popejoy Upbeat about Thrift's Future Health, American Banker, September 22, 1986, cited at ER 47. And, in Business Week, which calls FCA "Financial Corpse of

America," Popejoy is quoted as fretting, "I hope expectations aren't getting too high." Teresa Carson, FCA still Has to Live Up to Its Stock Price, Business Week, Mar. 10, 1986, at 34, cited at ER 4.

In Virginia Bankshares, the shareholders relied on the knowledge and expertise of those who appraised the stock in voting for the merger. Virginia Bankshares, 111 S.Ct. at 2757. There was no evidence that the investors were confronted with any contrary information from any outside authority, including the press. Here, Turner himself was inundated with information directly contrary to FCA's press release asserting it was "out of harms way". He admitted to reviewing the 10-K, which revealed several financial problems, as well as subscribing to

several stock reporting services which gave FCA the lowest safety rating as a risky investment.

The district court found that Turner did his own detailed financial analysis using Lotus 1-2-3 spreadsheets and was following the company closely. Turner's analysis and his knowledge about FCA's financial difficulties is sufficient to support the district court's judgment that reliance had not been established. Basic, Inc., 485 U.S. at 249. Thus, even if tne statements are misleading, Turner could not have reasonably been influenced by them in light of the inconsistency in the total mix of information available to and utilized by Turner at the time.

B. Material Omissions

Turner also alleges that FCA failed to disclose the inadequacy of its loan loss reserves. However, in the 1985 10-K disclosed the increase of loan loss reserves by $422 million in 1984 and $182 million in 1985. It also stated that FCA was still reviewing the loan portfolio. The press reported that loan loss reserves were expected to be raised. This information indicates the tremendous need to set aside funds for losses and that the company anticipated and made it known to the market that additional losses, and thus additional loss reserve funds, might be necessary. Turner admitted in his deposition that he can't point to something [in the 1985 10-K] and say it was a misstatement." The district court did not err in concluding that no material omission occurred.

Turner also challenges FCA's failure to disclose the Proof of Loss statement the company filed with it's insurance company to cover some of its bad loans. The Proof of Loss statement speaks of unsound lending practices which led to loans which could not be paid back and made FCA vulnerable to interest rate fluctuations. Although the document was not disclosed to the public, Turner pointed to no material information contained in the proof of loss which should have been disclosed. In his deposition, he was asked: "Is there anything that's raised in the Proof Of Loss financially, numbers, dollars and cents, that isn't reported in the 10-k?" Turner responded, "No ... As far as I'm aware." The previous management's unsound banking practices were much discussed in the press and mentioned in the 1985 10-K.

The need for loan loss reserves to compensate for these bad loans was also documented in the official statements of the corporation.

An omission is material if disclosure of the omitted statement would have altered the total mix of information available to the reasonable investor. Basic v. Levinson, 485 U.S. 224 231-32 (1988). There is no evidence that disclosure of the proof of loss statement would have altered the mix of information available since the information it contained was already available in the 10-K and in the press. Accordingly, the failure to disclose this information was immaterial.

Turner also alleges fraud stemming from the failure to disclose the potential sale of FCA to the Federal Home Loan Bank

Board (FHLBB). Yet the fact that FCA as a takeover candidate was well documented in the press. Popejoy had also told American Banker in September 1086 that he would welcome discussion with possible merger partners who could infuse much needed capital into the company. Mark Basch, Financial Corp.s Popejoy Upbeat about Thrift's Future Health, American Banker, September 22, 1986, cited at ER 47.

In fact Turner admitted in his deposition that FCA's potential as a buy-out candidate was one of the reasons he bought 50,000 shares of stock in June 1986. Any failure of disclosure was immaterial because the information was already publicly available.

Similarly, Turner claims FCA should have disclosed that Peat Marwick's 1985

unqualified audit opinion was premised upon the FHLBB providing a letter of support. Turner does not argue this claim on appeal and has therefore abandoned it. Cross v. State of Washington, 911 F,2d 341, 345 (9th Cir. 1990), cert. denied, ___U.S. ___, 111 S.Ct. 1313 (1991). Additionally, the letter of support from the FHLBB was quoted in full in the 1985 10-K. No material omission occurred with regard to this letter.

3. RICO

Turner also alleges an on-going RICO conspiracy between the FHLBB and FCA. However, a RICO claim requires an underlying predicate act of securities fraud. Occupational-Urgent Care Health Systems, Inc. v. Sutro & Co., Inc., 711

F. Supp. 1016, 1019 (E.D. Cal. 1989). None was shown here. Furthermore, Turner has not presented sufficient evidence of continuing fraudulent activity or the threat of such activity. Summary judgment was proper under these circumstances. H.J. Inc. v. Northwestern Bell, 492 U.S. 229 (1989).

4. Common Law Fraud Claims

Summary judgment for defendants/appellees was also granted on Turner's common law fraud claims. Where Turner has established neither the basic elements of material misrepresentation nor reliance, summary judgment was proper.

5. Turner's request for additional discovery

Turner contends that it was error not to

allow him additional time for discovery. Turner has not alleged specifically what would be gained by conducting discovery. A party is not entitled to discovery based upon the mere assertion that there are genuine issues of material fact. Hall v. Hawaii, 791 F.2d 759, 761 (9th Cir. 1986). Denial of the discovery request was proper where discovery would not alter the basis of summary judgment. California Union Insurance Co. v. American Diversified Sav. Bank, 914 F.2d 1271 (9th Cir. 1990), cert. denied sub. nom., Sahini v. Harbor Ins. Co., ___U.S.___, 111 S.Ct. 966 (1991). The district court did not abuse its discretion in denying Turner's request.

III. Conclusion

The district court's decision to grant summary judgment is affirmed. No abuse

of discretion was committed by ordering Turner's deposition, by denying him leave to amend his complaint or by denying his request for additional discovery.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN D. TURNER Plaintiff/Appellant v. FINANCIAL CORPORATION OF AMERICA, ET. AL. Defendants/Appellees	NO. 90-15847 USDC NO. C-89-2486-MHP ORDER

Before: D.W. Nelson, Noonan and Fernandez, Circuit Judges.

Judges D.W. Nelson and Fernandez voted to deny appellant's petition for re-hearing. Judge Noonan voted to grant appellant's petition for rehearing.

Appellant's petition for rehearing is DENIED.

[STAMPED]
FILED APR - 1, 1992
CATHY A. CATTERSON, CLERK
U.S.COURT OF APPEALS

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 90-15847
CT/AG#: C-89-2486-MPH

JOHN D. TURNER
Plaintiff-Appellant

v.

FINANCIAL CORPORATION OF AMERICA; AMERICAN SAVINGS AND LOAN ASSOCIATION PEAT MARWICK MAIN & COMPANY; ROBERT BARTON; WILLIAM POPEJOY et al.,

Defendants-Appellees

FILED
APR 27, 1992
RICHARD W WIEKING
CLERK

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the

United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed. Costs taxed.

Filed and entered February 21, 1992
A TRUE COPY; CATHY A. CATTERSON; Clerk of Court ATTEST APR 23 1992 by: Deputy Clerk

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN D. TURNER,

Plaintiff

__vs.__

FINANCIAL CORPORATION OF AMERICA et al.,

Defendants.

No. C-89-2486 MHP

AMENDED MEMORANDUM AND ORDER

Plaintiff John Turner ("Turner") brought this action against defendants, Financial Corporation of America ("FCA"); American Savings and Loan Association ("American"); Peat Marwick Main and Company ("PMM") and the individual defendants.[1] Plaintiff asserted federal claims under the Securities and Exchange Act of 1934 (sections 10(b)"), 15 U.S.C. § 78j and rule 10-b5 of the promulgation

therein, 17 C.F.R. § 240.10b-5 and under the RICO act, 18 U.S.C. §§ 1961-1968. In addition Plaintiff asserted state law claims of common law fraud, negligent misrepresentation and breach of fiduciary duty. The Federal Savings and Loan Insurance Corporation ("FSLIC") is acting as receiver for defendant American. The case is now before the court on defendants' motions for summary judgment, or in the alternative, summary adjudication of claims. Having considered the arguments and papers submitted by both parties , this court hereby grants defendants' motion for summary judgment in favor of all defendants.

BACKGROUND

American is a wholly-owned subsidiary of FCA. In 1984, under the management of

Chief Executive Officer Charles Knapp, American suffered a run on its deposits and its stock price plummeted from a high of $24 1/4 in January 1984 to a low of $5 1/8 in August of the same year. Following a tremendous decline in American's stock price Charles Knapp resigned and was succeeded by William Popejoy ("Popejoy") as chief executive officer of American in August 1984. Popejoy then announced the formation of an independent task force to determine the adequacy of loan loss reserves for the loans created during the period of Knapp's management. Such loans were alleged to have been made under inadequate of fraudulent banking practices. Upon completion of the Task force's review, the loan loss reserves were increased by $422,000,000. This fact was reported in FCA's 1985 10-K

report submitted to the Securities and Exchange Commission ("SEC") in March 31, 1986. The 1985 10-K report also revealed that periodic reviews of the loan loss reserves would take place and mentioned ongoing litigation resulting from Charles Knapp's loan making activity during his tenure at American.

Defendant PMM became involved with FCA as its independent auditor in 1984. Initially PMM had issued a qualified opinion certifying FCA's ability to operate as a going concern from FCA's 1985 financial statements. Subsequently, on March 25, 1986, PMM changed their initial opinion and issued an unqualified opinion certifying FCA's ability to operate as a going concern. This change was made pursuant to PMM's reliance upon a letter of support from the FHLBB to FCA

stating that the Federal Home Loan Bank Board ("FHLBB") would support American through its financial difficulties should the need arise. On March 31, 1986, the annual report containing PMM's unqualified opinion of FCA was submitted to its shareholders. Plaintiff received a copy on this date as well.

Plaintiff is a mortgage broker who has been in the real estate business for 30 years. From April 1986 through April 1987 plaintiff purchased a total of 90,000 shares of FCA stock. Subsequently American declared bankruptcy and plaintiff incurred a loss of approximately $816,000 resulting from the decline of FCA stock.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial...since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See also T.W. Electric Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626,630 (9th Cir. 1987) (the non moving party may not rely upon the pleadings but must present specific facts creating a genuine issue of material fact); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 278 (1986) (a dispute about a material fact is genuine "if the

evidence is such that a reasonable jury could return a verdict for the non moving party") The court's function, however, is not to make credibility determinations. Anderson, 477 U.S. at 249. The inference to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. T.W. Elec. Serv., 809 F.2d at 631.

DISCUSSION

I. FSLIC's Motion for Summary Judgment.

A. 10 (b) and 10b-5 Claims

Plaintiff in his November 1989 deposition alleges four omissions which serve as the basis for his 10(b) and 10b-5 claims. Plaintiff alleges that defendant failed

to disclose:

1) the fact that millions of dollars worth of improvident loans existed which were not reflected in the loan loss reserves reported by FCA;

2) that certain of its losses were attributable to fraud as claimed in American's Proof of Loss statement[2] submitted to its insurance company in 1986;

3) that the FHLBB was searching for a buyer for American; and

4) that the unqualified opinion issued by PMM in FCA's 1985 financial statements was the result of PMM's reliance on a letter of support from the FHLBB.

Furthermore, plaintiff asserts that it relied upon the overly optimistic statements made by Popejoy during the period plaintiff invested in FCA stock and that Popejoy's statements constituted

material misrepresentations.

Defendant FSLIC contends that this court should grant summary judgment in its favor because plaintiff fails to establish the elements of materiality and reliance required in securities fraud claims. Plaintiff represents himself in this action and maintains that the above omissions and misrepresentations were material and that he relied upon them.

1. Materiality

The test for determining the materiality of an omission was set forth in Basic, Inc. v. Levinson, 485 U.S. 224 (1988). The Supreme Court stated that an omission would be deemed material if there was 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as

having significantly altered the "total mix" of information available.' Id. at 231-32, quoting TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438,449 (1976). Adhering to the Basic court's definition of materiality, this court is unable to find the above non-disclosures material for the following reasons.

From the numerous exhibits submitted, it appears that the information available in the marketplace, both before and during plaintiff's purchases, was sufficient to give plaintiff an accurate picture of FCA's financial condition.

Two of FCA's alleged omissions were reported by prominent financial publications prior to and during the time plaintiff purchased FCA stock. The fact that American was the subject of a

takeover, or that a buyer was being sought for it, was well documented in the press. Thurston Dec., Exs. 16 and 47. Additionally, the fact that PMM Relied on a letter of support from the FHLBB was reported in a Wall Street Journal article dated April 1, 1986.[3] Thurston Dec., Ex 23. The remaining two omissions alleged by plaintiff, pertaining to the understated amounts of loan loss reserves and the fraud mentioned in FCA's proof of loss statement, may also be deemed immaterial amidst the amount of information available concerning FCA's financial condition and history.

The major omission on which plaintiff appears to base his 10b-5 claim is the alleged failure of FCA to disclose the actual amount of improvident loans existing on its books at the time of the

completion of the task force's review. Although plaintiff is correct in asserting that the loan loss reserves underestimated the actual amount of improvident loans existing, the fact that the loan loss reserves were not "set in stone" was made quite clear in FCA's 10-K statement which plaintiff received on March 31, 1986. Thurston Dec., Ex. 24-30. Indeed, the 10-K provided that further increases in loan loss reserves were to be expected in the future and that FCA intended to review its loan loss reserves periodically throughout 1986. See Id. There were also numerous articles attesting to what was disclosed in the 10-K[4] besides the actual increases made to the loan loss reserves while plaintiff continued to purchase FCA stock. Thurston Dec. Exs 16 and 40. considering such evidence, this court is unable to

find that the alleged omission of the actual amount of improvident loans existed on FCA's books was material. Not only was FCA incapable of such an accurate estimation at the time plaintiff began investing, but this limitation was disclosed in the company's 10-K statement which plaintiff received prior to his investment in FCA.

Plaintiff relies on American's Proof of Loss statement,[5] submitted to its insurance company in 1986, in alleging that FCA failed to disclose the fraud of the Knapp management which had created the improvident loans. Again this alleged omission fails to meet the materiality test imposed by Basic. The details of the Knapp management's misdeeds were well documented in various financial periodicals as well as in FCA's

10-K report and financial statements. Thurston Dec. Exs 20,28 and 47. In addition plaintiff claims the losses as demonstrated by the proof of loss far exceeded defendant's disclosures. This is not supported by the proof of loss, however. The total of the sums referred to in the document is substantially the same as the amounts revealed in the 10-K and the public disclosures. Thus, plaintiff's alleged reliance on the Proof of Loss statement is unconvincing since such omissions cannot even be proven to have existed.

Plaintiff also assets that it relied upon the overly optimistic statements made by Popejoy. He contends that Popejoy's statements such as "We're out of harm's way ..." and "we're millineniums ahead of where we were a

year-and-a half ago," constituted material misrepresentations. See Thurston Dec., Ex. 47. General statements of optimism are ordinarily not actionable as 10b-5 material misrepresentations unless it can be shown that the speaker had no reasonable basis for making the statement or was aware of some undisclosed facts. See Marx v. Computer Sciences Corp.' 507 F.2d 485, 490 (9th Cir. 1974). Plaintiff has offered no proof indicating that Popejoy made those statements under such circumstances. Moreover, such statements are incapable of being branded as material misrepresentations since there was an abundance of public information detailing FCA's financial condition. Thurston Dec. Exs. 20,21,23,40, and 43. Even the articles plaintiff points to as being misleading because of their

optimistic statements include negative information and caution careful evaluation. See, e.g.' Thurston Dec. Exs., 20,21,23, and 47. Thus a reasonable jury could not find that the omissions or misrepresentations alleged by plaintiff were material since the disclosure would not have significantly altered the total mix of information available in the marketplace.

2. Reliance.

Defendant FSLIC contends that plaintiff's individual investment strategies and purchasing behavior are indicative of plaintiff's non-reliance on FCA's alleged misrepresentations and omissions. Plaintiff maintains that he relied on the omissions and misrepresentations outlined above. It

should first be noted that plaintiff was not unsophisticated. He was remarkably knowledgeable in the very field in which American operated. He also used a variety of sources to keep himself informed about the market in general, and American in particular. In making his decision to invest in FCA, plaintiff subscribed to various stock reporting services and utilized computer software packages. Thurston Dec. Exs. 6,12,13, and 14.

The facts indicate that as the price of FCA stock plummeted, plaintiff continued to purchase stock despite the negative publicity FCA was receiving. See Thurston Dec., exs. 16 and 47. Plaintiff himself admitted in his deposition that investment in FCA was classifiable as highly risky or

speculative. Thurston Dec., Exs. 17, 70. Plaintiff also acknowledged having reviewed the Value-Line stock report which characterized FCA stock as extremely volatile and risky, as well as other information in the marketplace. Exs. 12,20, and 21. After taking into account the facts presented in all of plaintiff's rationales for his continued purchase of FCA stock--despite its decline in value, this court finds that plaintiff is unable to prove the element of reliance in this case. This evidence, by its very nature, is particularly within the reach of plaintiff.

The only purchase which might be justified despite the stock's decline in value was the 500 shares plaintiff purchased allegedly for the purpose of obtaining a shareholder list from FCA.

The other purchases which took place despite a plethora of information existing in the marketplace tends to indicate that plaintiff was relying more on the "greater fool theory," (as some financial analysts have espoused as the reason for FCA's increase in stock value), than on any optimistic picture of FCA painted by Popejoy. Thurston Dec. Ex. 16. Although it has been held that questions of materiality and reliance involve assessments peculiarity within the province of the trier of fact, Arrington v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 651 F.2d 615, 619 (9th Cir. 1981), the most recent pronouncement from the Ninth Circuit on the issue of materiality indicates summary judgment is appropriate where there can be but one reasonable conclusion. See Also In Re Apple

Computer Securities Litigation, 886 F.2d 1109, 1112-13 (9th Cir. 1989). Taking the facts viewed in the light most favorable to the plaintiff, this court is unable to find that plaintiff makes a sufficient showing to establish the existence of any material omissions or misrepresentations. Furthermore, even if such material misrepresentation or omission existed plaintiff still failed to establish the element of reliance. Thus the only reasonable conclusion this court can reach is to grant summary judgement in favor of FSLIC.

B. Common Law Claims

Plaintiff brings claims of common law fraud, negligent misrepresentation and breach of fiduciary duty against FSLIC. Since these claims require showings of

materiality and/or reliance, plaintiff could not prevail on these claims for the reasons explained above. Therefore, this court grants summary judgment in favor of FSLIC on these claims as well.

C. RICO CLaims

The predicate acts required under 18 U.S.C. section 1961(1)(D) are defendants' violations of the federal securities laws, therefore the RICO claims brought against defendants must also fail. See Generally, Occupational-Urgent Care Health Sys., Inc. v. Sutro & Co., 711 F. Supp. 1916, 1019 (E.D. Cal. 1989). Thus, summary judgment in favor of FSLIC is granted on these claims.

D. Mitigated Damages

The issue of mitigated damages raised by the defendants is moot since this court grants FSLIC's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

II. PMM'S Motion for Summary Judgment

A. 10(b) and 10b-5 Claims

Defendant PMM contends that it owed no duty to disclose to plaintiff any information concerning FCA's financial condition. Plaintiff maintains however, that a duty to disclose did exist on PMM'S part and argues that the unqualified opinion issued by PMM in FCA's 1985 financial statements constituted a material omission upon which the plaintiff relied.[6] Before this court can proceed to discuss the merits

of plaintiff's securities fraud claims it must first resolve the issue of whether PMM owed plaintiff a duty to disclose information.

Defendant PMM argues that their professional duty as auditors is limited to conducting audits in conformity with generally accepted accounting standards ("GAAS"). They further contend that by their nature audits do not involve extensive research or analysis of management's future plans or of the plans of regulatory agencies. Despite PMM's above arguments, this court finds the Ninth Circuit's opinion in Roberts v. Heim, 670 F. Supp. 1466 (N.D.Cal.1987) dispositive of the issue of accountants' liability. In Roberts, the court acknowledged that accountants could be held liable under section 10(b) despite

the fact that "their statements comported with generally accepted accounting principals" ("GAAP"). Id. at 1480. The rational offered for finding liability was that the accounts' statements, albeit technically accurate, gave a false impression of the financial health of the company. Id. Thus, this court finds PMM owed a duty to plaintiff above and beyond the standards mandated by the Accounting Institute of Certified Public Accountants ("AICPA").

The question then to be addressed is whether PMM's alleged failure to disclose its reliance on the FHLBB letter of support constitutes a material omission. PMM, however, contends that this allegation is not supported in the record since there were numerous disclosures on PMM's reliance on the FHLBB letter. Pmm

points specifically to the notes to FCA's 1985 financial statement, FCA's 10-K report, and a Wall Street Journal article of April 1, 1986, where a PMM spokesman publicly announced that it relied upon the FHLBB letter in issuing its unqualified opinion. With such evidence presented before it, this court finds that plaintiff has failed to establish the underlying premise of his argument. There was no omission.

B. RICO CLAIMS

Again, since the predicate acts required under the RICO statue are defendant's violations of the Federal securities law, the RICO claims brought against PMM must fail, and summary judgment is granted in PMM's favor on these claims as well.

CONCLUSION

Accordingly, having considered the arguments and papers submitted by both parties, this court hereby GRANTS defendants' motion for summary judgment in favor of defendant Federal Savings and Loan Insurance Corporation and defendant Peat, Marwick, Main and Company.

IT IS SO ORDERED.

Dated: May 7, 1990

s/ Marilyn Hall Patel

United States District Judge

END NOTES

1. The individual defendants in this case are the officers/directors of FCA and/or American during the time Turner purchased FCA stock. The individuals are William J. Popejoy, Victor H. Indiek, Merril Butler, Donald E. Royer, Neil N. Stolz, J. Ralph Stone, Robert M. Barton, Annelise G. Anderson, Edwin L. Johnson, Thomas P. Kemp, Charles E. Young and Lawrence K. Roos.

2. The "Proof of Loss" is a document submitted by American to its insurance carriers. Contained in that document are claims in excess of $400 million attributed to the allegedly fraudulent banking practices during Charles Knapp's tenure.

3. The article provided in relevant part: "[FCA] said its outside auditors, Peat, Marwick, Mitchell & Co., issued an unqualified opinion after qualifying its opinion of Financial Corp. 1984 annual report. However, a Peat Marwick spokesman said the unqualified opinion resulted from a letter of support for financial corp. from the Federal Home Loan Bank Board, which promised to 'continue to provide support to the company...to enable it to continue as a going concern.'"

4. See Thurston Dec., Exs. 16 and 40. Exhibit 16 is an article which appeared on March 10, 1986, in Business Week which refers to FCA as "Financial Corpse of America." (emphasis added). Exhibit 40 is an article which appeared in the New York Times on June 13, 1986, and mentions the possibility of FCA increasing the loan loss provisions in the future.

5. This court notes that Plaintiff's submission on the Proof of Loss statement may be questionable since it is not authenticated. However, as noted above it does not support plaintiff's position in any event.

6. Unqualified opinions issued by PMM represent PMM's certification of FCA's ability to operate as a going concern.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN D. TURNER,

Plaintiff

__vs.__

FINANCIAL CORPORATION OF AMERICA et al.,

Defendants.

No. C-89-2486 MHP

JUDGMENT

Fed. R. Civ. P. 58

This action having come before this court, the Honorable Marilyn Hall Patel, United States District Judge presiding, and the issues having been duly presented and an order having been duly filed herein,

IT IS ORDERED AND ADJUDGED

that defendants' motion for summary

judgment is granted in favor of Federal Savings and Loan Insurance Corporation, Peat Marwick Main and Company, American Savings and Loan Association, William J. Popejoy, Victor H. Indiek, Meril Butler, Donald E. Royer, Neil N. Stolz, J. Ralph Stone, Robert M. Barton, Annelise G. Anderson, Edwin L. Johnson, Thomas P. Kemp, Charles E. Young, and Lawrence K. Roos and that this action is dismissed.

IT IS SO ORDERED

Dated: MAY 24, 1990

s/ MARILYN HALL PATEL

United States District Judge

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN D. TURNER, Plaintiff/Appellant vs. FINANCIAL CORP. OF AMERICA, et al., Defendants/Appellees	No. 90-15847 DC# CV-89-2486-MHP Northern California (San Francisco) PETITION FOR REHEARING

PETITION FOR REHEARING BY APPELLANT

To The Clerk of the Ninth Circuit Court of Appeals:

Appellant John D. Turner respectfully petitions for rehearing citing the following points of material fact overlooked in the memorandum of decision.

I. MATERIAL POINTS OF FACT OVERLOOKED IN THE DECISION

Contrary to the appellate court's memorandum of decision page 8, stating "Turner also admitted in his deposition that he 'can't point to something [in the 1985 10-K] and say its a misstatement.'"

EXHIBIT 10 of the excerpts of record provided the appeals court by Turner at pages 94, line 23 through page 96, line 23 states:

"Q What is it that you believe was not accurate in any 10-Q or 10-K of FCA?

A Well, I think it's obvious that my argument is that Financial Corporation of America was under the control of the

Federal Home Loan Bank from August 1984 when they installed Mr. Popejoy, when they removed Mr. Knapp and installed Mr. Popejoy, that the entire purpose for keeping Financial Corporation of America operating has been to attempt to mitigate damages to FSLIC, and that had they followed the San Francisco recommendation, which Cerona gave, they would have closed it in 1984, and that the only reason they didn't close it was they didn't have the money in the fund to do it; and that it was -- in my opinion, the attempt then from that point forward as all of the bad news began to become revealed about the loan portfolio, the problems in the loan portfolio and et cetera, that every decision that was made was made in an attempt to keep this company operating, letting out as little

information as possible, and withholding information which had the market known, would probably have precipitated another run on the association, and certainly a valuation of the stock where it eventually ended up, as nothing.

Q What specifically do you feel was in the 10-Q or 10-K's on FCA that was not accurate?

A Specifically the provision for loan losses, the knowledge that the company had about the loan portfolio, the knowledge that the company had that properties were being carried on the books at values in excess of their known true values, and all the things that I outlined in my complaint.

Q Is there anything other than --

when you talk about the loan loss provisions, are you saying that the number that appeared, that the dollar amount that appeared for the loan losses was not accurate?

A No, the disclosure. Until I get in -- I have been unable to get in and go loan by loan by loan or transaction by transaction, which I'm hopeful that I will be able to do one day. But basically what was known about the loan portfolio as set forth in the proof of loss documents was discovered between the fourth quarter of 1984 and, according to the testimony of Mr. Popejoy, the signed sworn statement of Mr. Popejoy, and November of 1985. All the information about the fraudulently generated loans, loans that were generated without

proper underwriting standards, without appraisals in many instances, and et cetera, all the things that are set forth in that proof of loss were all known to the company between August of '84 and November of '85. None of this information was directly revealed in the 10-Q's and the 10-K's of the company."

In part the Proof of Loss states:

". . .these officers generated a high volume of loan transactions with significant loan fees without adherence to adequate underwriting standards and utilizing appraisals of collateral securing the loans that had no reasonable factual support."

" The bulk of these transactions,

typically construction or other types of commercial loans. . ."

"In generating these loans, the company often obtained higher than market rates of interest. However, these rates, extracted from borrowers because the Company was very often the sole source of funding available for these imprudent loans, were illusory because the borrower (and/or income from the proposed project) was incapable of repaying the loan or servicing the debt except through employment of an interest reserve. Another purpose of making these loans was to generate large amounts of origination fees which far exceeded the amounts which would have been paid by credit worthy borrowers." Proof of Loss, Turner Complaint, Exhibit "E" [hand numbered

pages 113-114].

The appeal court is respectfully advised that Turner said in the above deposition testimony that every statement on FCA's 1985 10-K referring to the $14.9 billion dollars in loan receivable assets was a misstatement since it did not disclose:

a) that the $14.9 billion of loan receivable assets were generated through a general practice of fraud and improvidence.

b) that the $14.9 billion of loan receivable assets were being carried on FCA's books at values above their known true value.

So the appeal court's statement on page eight of the memorandum stating "Turner also admitted in his deposition that he "can't point to something in [in the 1985 10-K] and say it is a misstatement" is an untrue characterization of what Turner said and a material point of fact overlooked in the decision.

The proof of loss discloses that senior management of FCA knew that the $14.9 billion in loan receivable assets were not only unsound an improvident -- but were originated through fraudulent practices. The San Francisco Federal Home Loan Bank knew that the value of these assets were as much as $4 billion dollars less than the $14.9 billion they were carried for upon FCA's books.

II. MATERIAL POINT OF FACT OVERLOOKED IN THE DECISION

On page 9 of the decision the appeal court states "There is no evidence that disclosure of the proof of loss statement would have altered the mix of information available since the information it contained was already available in the 10-K and in the press".

This statement is simply untrue. To arrive at such a conclusion one has to weigh soft information evidence and interpret it favorably to FCA and against Turner, which is in conflict with the supreme court decisions such as:

"Our prior decisions may not have uniformly recited the same language in

describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. (1985) at 249.

III. MATERIAL POINT OF FACT OVERLOOKED IN THE DECISION

The decision states at page 9 bottom paragraph "Turner also alleges fraud stemming from the failure to disclose the potential sale of FCA to the Federal Home Loan Bank Board(FHLBB)."

There is no evidence presented in this case that there was ever any mention of selling FCA to the FHLBB or that the

FHLBB would have purchased FCA. The evidence was that the FHLBB disclosed to FCA, in a regulatory meeting on November 6, 1986, that they were going to sell American Savings, FCA's only major asset. This meant that they were going to have to seize it in order to sell it. There was no talk of buying American from FCA in order to resell it.

The evidence was before the court in the form of the chronology of contact between the San Francisco Federal Home loan Bank (SF-FHLB) which reported a meeting:

"11/06/86 A quarterly meeting was held among FCA/American and representatives of the agency and the Bank Board. American's additional proposed asset growth again was discussed. The FHLBB

stated that it was considering becoming more active in the process of recapitalizing American by attempting to find a buyer for American. American's management stated that Drexal now felt an equity offering was not feasible under current market conditions."

Later in their corrections to the Peer Review Report on their performance the SF-FHLB complained:

"...Since September 1986, the FHLB-SF has not controlled the examination or supervision of American Savings and Loan. On that date, FHLB-SF was notified by Washington that we could not release examination conclusions, nor discuss these matters with American's management without the prior consent of the

Chairman. . ."

"With respect to supervision, the FHLB-SF has had little involvement since April 1986, when Chairman Gray and Chief of Staff Fairbanks seized control over the supervisory process" . . . "we have not been in a position to examine or supervise American effectively, and consistent with our responsibilities."

" . . . the significant Supervisory write-up estimates a $4 billion cost to the FSLIC to resolve this case."

" Because of its size, the Bank Board, under then Chairman Gray, became actively involved in attempts to resolve American's financial dilemma about two years ago." [February 1986]

APPELLANT TURNER'S PETITION;

And Turner Declaration Exhibit "14", where the new FHLBB Chairman M. Danny Wall states [on above video Exhibit "56"]:

"In the case of American of Stockton -- when I got to the Bank Board July 1, 1987 I discovered that that office was running American Savings and Loan and I immediately began to undo that. It had been there and it had been run from that office -- and those -- that suite of offices for several years."

IV. CONFLICT WITH BLACKIE, BASIC AND ANDERSON

This above information is far different from FCA attempting to sell itself, or to merge itself, where it was in control of its own destiny.

Further, it conflicts with the congressional intent when formulating the SEC laws that investors not be victims of secreted information:

"No investor, no speculator, can safely buy and sell securities upon the exchanges without having an intelligent basis for forming his judgment as to the value of the securities he buys or sells. The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just price.

Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the

operation of the markets as indices of real value." H. R. Rep. No. 1383, at 11. [As quoted from Basic v. Levinson, 485 U.S. at 246 (1988)]

"The test is more than satisfied when a series of financial reports uniformly misrepresent a particular item in the financial statement. In that situation the misrepresentations are"interrelated, interdependent, and cumulative"

Rule 10-b5 liability is not restricted solely to isolated misrepresentations or omissions; it may be predicated on a practice or course of business which operates as a fraud. . ." "fraudulently creating an illusion of prosperity and false expectations". (at 903 footnote 19) Blackie v. Barrack, 524 F.2d 891 (1975)."

APPELLANT TURNER'S PETITION;

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes, 398 U. S., at 158-59. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case

where there is reason to believe that the better course would be to proceed to a full trial. Kennedy v. Silas Mason Co., 334 U.S. 249 (1948). [As stated in Anderson v. Liberty Lobby, Inc., 477 U.S. (1985) at 255].

I respectfully submit that the court's decision in this case is deciding as a matter of law that because FCA's securities were risky (rather than a sham) they should not have been purchased by any reasonable person, including Turner.

FCA was a Fortune 500 Company listed on the New York Stock Exchange. The Courts standard as applied to me requires the assumption that every person who traded in FCA's securities during the period of the Popejoy era to have

purchased FCA stock even though it was commonly known in the market from media stories that FCA's financial statements were not disclosing losses that were built-in and not yet reported. And that every purchaser knew this, or should have known it from media reports and press stories. And that the reason for FCA's stock rising 326% from $5 to $17 was that every purchaser bought the security solely on the premises that someone else would pay a higher price for the valueless security they had bought. This conflicts with Basic's Class Action holding:

". . . Thus the market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the

investor, informing him that given all the information available to it, the value of the stock is worth the market price." Basic v. Levinson, 485 U.S. 224, at 244, (1988) quoting In Re LTV Securities Litigation, 88 F.R.D. 134, 143 (ND Tex. 1980)

On the basis of the material points of fact and the conflicts with other decisions of this court I respectfully petition this court for a rehearing.

Respectfully submitted

March 5, 1992

_____

John D. Turner - Appellant

[Barnes Exhibit 3; Appellees' From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

EXHIBIT D-17 FOR IDENTIFICATION
BARBARA VOLZING N.P.
DATE 11-9-89
DEPO OF John Turner
DEFENDANT'S EXHIBIT D-17

[Pertinent Sections copied from:]

SECURITIES AND EXCHANGE COMMISSION
FORM 10-K

FINANCIAL CORPORATION OF AMERICA

For the fiscal year ended
December 31, 1985

State Aggregate market value of voting stock. . . $493,252,733 as of March 21, 1986

Indicate number of shares outstanding. .

35,912,700 shares of common stock as of

March 21, 1986

1. BUSINESS

Delinquencies and Scheduled Items

. . .The increase in slow loan and foreclosed property categories of scheduled items (as defined by FHLBB regulations) and ratios of scheduled items to specified assets and to total

assets for American at the dated indicated. The increase in slow loan and foreclosed property categories of scheduled items during 1985 is primarily attributable to an increase in the number of construction loans which became delinquent. . .

Real Estate Valuation and Allowance for Estimate Losses

In 1984 the Company's new management appointed a Real Estate Task Force to make a special review of the adequacy of the Company's reserves for potential losses on loans and real estate investments. As a result of this evaluation, completed in March 1985, loan and real estate loss reserves were increased by $422 million as of December 31, 1984. The Company has not determined

the extent to which the loss reserves established at December 31, 1984 should have been allotted to different periods. The SEC is conducting an investigation relating to the Company's practices in establishing loan loss reserves. See "Legal Proceedings--Securities and Exchange Commission".

Following the completion of the examination of financial statements for 1984 and the filing of the Company's Form 10-K on April 1, 1985, the company commenced the development of a system that was intended to permit a more meaningful review of the loss reserves. By the end of 1985, all loans with principal balances in excess of $500,000 were reviewed. Because of the number of loans it was not practicable to complete the analysis of the adequacy of the

Company's loss reserves until the end of the fourth quarter of 1985.

At the end of the fourth quarter, as a result of the completion of the review commenced earlier in the year, the Company increased its provision for real estate and loan loss reserves by $25 million. That reserve was established because a significant number of additional foreclosures of single family residences had occurred since the prior review was completed. The additional reserve in the third quarter were developed statistically to take account of these new foreclosures.

At the end of the fourth quarter, as a result of the completion of the review commenced earlier in the year, the company increased its provision for real

estate and loan loss reserves by $157 million for the quarter and $182 million for the year, to $575 million at December 31, 1985, compared to $472 million at December 31, 1984 and $58 million at December 31, 1983.

The additional real estate valuation reserves were provided in 1985 for properties that continued to decline in value, primarily condominiums, and for properties located in areas where the real estate market is stagnant. Based on the operating experience during 1985 and the outlook for the future, many condominium projects were valued as apartment projects in the 1985 year end review instead of using the higher values as condominiums. The company also suffered cost overruns on several major projects. In addition, the 1985 loss

provision includes an estimated loss of $7 million to be incurred upon sale of certain loans.

The company intends to review its provision for losses periodically throughout 1986. It will attempt to make adjustments on a quarterly basis as required. However, because of the magnitude of the review process, it will not be possible to include the entire portfolio in each quarterly review. The company's goal is to identify and evaluate new problem areas as soon as reasonably practicable.

ITEM 3. LEGAL PROCEEDINGS

John L. Waller on behalf of himself and all others similarly situated, vs. Financial Corporation of America; ... a class action alleging violation of

federal securities laws arising out of the company's accounting for transactions involving foreclosed property and delinquent loans. This action was filed on May 3, 1983, following the Company's restatement of its 1982 financial reports with respect to these transactions. . . .

Husni vs. Financial Corporation of America;...The company is currently a party to several actions arising out of the accounting for purchases of Government National Mortgage Association pass-through certificates acquired under dollar reverse repurchase agreements.

Between August 17, 1984 and September 26, 1984, a total of 19 shareholders of the company filed derivative or class actions alleging violations of state and federal securities laws and breach of fiduciary

duties and waste of corporate assets against certain former and present directors and officers of the Company...On November 14, 1984 both a consolidated and derivative complaint and a consolidated class action were filed...The Company is named as only a nominal defendant The consolidated derivative complaint alleges that between August of 1983 and approximately July of 1984 the individual defendants, while officers and directors of the Company, caused the company to engage in a course of business conduct characterized by reckless high risk growth, resulting in mismanagement of the company, waste and diversion of corporate assets and breach of fiduciary duties owed the Company...The consolidated class action complaint alleges that the defendants, including the Company, pursued a course

of conduct which resulted in artificially inflating the market values of the Companies equity securities and that violations of federal and state securities laws occurred...

The Company has reached an agreement in principal to settle the class actions, Waller vs. FCA, et al., and the FCA Shareholder Litigation referred to herein above . . . The settlements contemplate that the Company will issue common stock (or cash at its option) to persons who purchased FCA securities between April 1, 1980 and April 15, 1985. The value of the settlements to the classes is a minimum of $32.0 million. The actual value of the settlements is dependant upon the per share of the Company's stock when the claims process has been completed and could be as much as $42.7

million (which would be reached if the stock were trading at $18 per share).

Securities and Exchange Commission. During 1985, the staff of the Securities and Exchange Commission continued to conduct an inquiry originally commenced on an informal basis in July 1983, and conducted subject to a formal order of investigation after February, 1984. The inquiry focused primarily on the accounting treatment accorded to certain transactions involving the purchase and resale of company's subsidiary American (formerly State) Savings and Loan Association in 1980 and 1981, although other issues were raised. The company has been advised by the Staff that the Staff does not currently intend to make any enforcement recommendation with respect to any matters covered by the

inquiry.

In addition, on April 9, 1985, the Securities and Exchange Commission issued an order directing the Staff to conduct a private investigation into the company's practices in establishing loan loss reserves. The investigation focuses on the period from 1980 to the present and pertains to the financial condition of the Company, the results of its operations and its assets and liabilities. The investigation is continuing and the Company is cooperating with the Staff in producing the documents with documents and records requested.

ITEM 7. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

Financial Condition

. . . Stockholder equity totaled $230 million at December 31, 1985, which represented 0.84% of consolidated assets. Stockholder's equity was $194 million, or 0.68% of consolidated assets, at December 31, 1984 . . .

Cost reduction programs decreased general and administration expenses by $92 million. Operations also included provisions for losses on loans and real estate and a settlement of certain litigation of $222 million for the year...

Results of Operations

General

The company had net income of $53 million in 1985, compared to a net loss of $590 million and reported net earnings of $172

million for the years 1984 and 1983 respectively. The results of operations in 1985 include gains on the sales of loans of $350 and a 222 million provision for losses on loan and real estate and a loss provision to cover settlement of certain outstanding litigation. The results of operations for 1984 include a $422 million provision for losses on loans and real estate. The company has not determined what part, if any, of the 1984 reserve for losses may have related to prior periods. The 1984 operating loss also reflects intense competition in mortgage lending and prevailing mortgage rates, which generally lagged behind the Company's rapidly rising cost of funds.

Expenses

General and administrative expenses

decreased to $326 million in 1985 from $418 million in 1984. Such expenses amounted to $189 million in 1983. The decrease in expenses in 1985 is attributable to a reduction of workforce, decreasing in number of Company automobiles, disposal of all Company airplanes and a continuation of the cost reduction program started in the fourth quarter of 1984. . .

The provision for losses and discounts decreased to $222 million for 1985 compared to $516 million and $45 million in 1984 and 1983 respectively. The 1985 provision consists primarily of $182 million for estimated losses on loans and real estate and resulted from a review by the Company of its real estate and real estate loans. In addition, the Company provided a provision to cover the

estimated costs of settling certain litigation.

ASSETS

	1985
. . .	
Loans Receivable, net. . .	$14,974,246
Property acquired in settlement of loans. . .	930,926
. . .	
TOTAL ASSETS	$27,374,935
. . .	
TOTAL LIABILITIES	$27,145,207
TOTAL STOCKHOLDER EQUITY	229,728
. . .	
TOTAL LIABILITIES AND STOCKHOLDERS' EQUITY	$27,374,935

Pursuant to the requirements of Sections

13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized, in the City of Irvine, State of California, on the 25th day of March, 1986.

Financial Corporation of America
(Registrant) By: William Popejoy
Chairman of the Board and Chief Executive Officer.

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the Registrant and in the capacities and on the dates indicated.

Signature	Title	Date
WILLIAM POPEJOY,	Chairman of the Board and Chief Executive Officer.	March 25, 1986
VICTOR H. INDIEK,	Executive Vice President,	March 25, 1986
ANNELISE G. ANDERSON,	Director	March 25, 1986
ROBERT M. BARTON,	Director	March 25, 1986
MERRILL BUTLER	Director	March 25, 1986
EDWARD L. JOHNSON,	Director	March 25, 1986
THOMAS P. KEMP,	Director	March 25, 1986
LAWRENCE K. ROOS,	Director	March 25, 1986
J. RALPH STONE,	Director	March 25, 1986
CHARLES E. YOUNG	Director	March 25, 1986

[End Pertinent Sections copied from:]
SECURITIES AND EXCHANGE COMMISSION
FORM 10-K

[From Barnes Exhibit 3; Appellees' From The United States District Court For the Northern District Of California; Case C-89-2486-MHP]

EXHIBIT D-17 FOR IDENTIFICATION
BARBARA VOLZING N.P.
DATE 11-9-89

[Thurston Exhibit 20; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[EXHIBIT D-178 FOR IDENTIFICATION; JOANN WEBER N.P.; DATE 11-9-89; DEPO OF John Turner; DEFENDANTS EXHIBIT D-178]

LEVEL 1 - 8 OF 8 STORIES

Copyright (c) 1985 The New York Times Company; The New York times October 9, 1985, Wednesday, Late City Edition

SECTION: Section D; Page 1, Column 3; Financial Desk; Length: 1323 Words

HEADLINE: FINANCIAL CORP.'S CLIMB BACK

BYLINE: By Thomas C. Hayes, Special to the New York Times

DATELINE: LOS ANGELES. Oct. 8

BODY:

Since William J. Popejoy succeeded Charles W. Knapp as chairman of the

troubled Financial Corporation of America in August 1984, the company has benefitted from a three-percentage-point drop in short-term interest rates. That decline has brought record profits to many of Mr. Popejoy's large competitors in California. However, for the Financial Corporation and its main subsidiary, the American Savings and Loan Association - the nations's largest thrift institution - it has not been enough.

And the company is still vulnerable if interest rates head upward. Mr. Popejoy agreed with the projection by Jonathan E. Gray, an industry analyst with Stanford C. Bernstein & Company, that it would take less than a year for a one-percentage-point rise in short term rates to erase the Financial Corporation's thin

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supply of capital if the company did nothing different to generate profits or reduce interest expenses.

"But if we didn't do anything we should be fired." Mr. Popejcy added.

He noted that the Financial Corporation had been collecting fees from new mortgages, employing interest rate swaps, hedging on interest rate futures and issuing mortgage backed securities to ease the threat of rising rates.

Unusual Bet

Mr. Knapp, who built the Financial Corporation into the nations biggest thrift institution, attracted widespread attention with his unusual bet. As other savings and loan associations withdrew from the mortgage market when interest

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rates rose in the 1970's, the financial corporation's thrift subsidiary, then called state Savings and Loan, actively issued mortgages, paying high prices in the marketplace for the necessary funds. The yield on its mortgage portfolio was among the highest in the industry, but so was its costs of funds.

In the course of growing 40 percent a year, however, Mr. Knapp was also accumulating high expenses and a mountain of bad real estate loans, which contributed to the thrift institution's subsequent problems.

In 1983, the Securities and Exchange Commission questioned the company's accounting practices, and forced it to reduce its 1982 earnings.

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In August 1984, American Savings and Loan faced a hugh deposit outflow when the S.E.C forced it to restate its first-half earnings of $75.3 million to a loss of $79.9 million. Last April, after reporting a staggering loss of $422 millon for 1984, the largest ever for a thrift institution, the financial corporation was paying as much as a full percentage point above the competition to attract deposits.

Mr. Knapp described his departure following a two-week, $6.8 billion run on deposits last year as voluntary, but he was said to have come under pressure from Federal regulatory authorities to step aside. He has not bowed out of the financial arena, however. He now heads a multifaceted investment concern called Trafalgar Holdings Ltd., based in Los

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Angeles, that has participated as an investor in some major takeover battles.

Corporate Jets Gone

The financial Corporation, however, is pursuing a consciously more conservative course now. In the 14 months since he succeeded Mr. Knapp, Popejoy has moved quickly to cut costs. Mr. Popejoy, who is the former head of the Federal Home Loan Mortgage Corporation, and president and chief executive of American Savings before it was acquired by the Financial Corporation in 1983, has jettisoned the fleet of nine corporate jets and 600 cars, and moved the company into modest offices in Irvine, Calif. He has also pared the company's annual operating budget by nearly $100 million, to $300 million, and has cut employment to 5,300

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from more than 8,000.

For all his efforts, however, Mr. Popejoy, has not been able to deal with some of the Financial Corporation's basic problems. It is still vulnerable to a rise in interest rates because about 90 percent of American Savings' mortgage assets still carry fixed rates, while about 85 percent of the interest paid on deposits and borrowings change within a year or less. Moreover the company receives no revenue at all on $1.8 billion in foreclosed property and other loans.

Back in the Black

Last Spring, Mr. Popejoy said the company would become profitable when the difference between what it earns on mortgages and other investments and what

it pays on deposits and debt exceeded 2.5 percentage points. The financial Corporation moved into the black at the end of August with an asset yield of 11.81 percent and a cost of funds at 9.22 percent, a spread of 2.59 percentage points.

Despite the continued risks, Mr. Popejoy, who is 47 years old, clearly has fans. Charles Mills, for example, a special situation analyst at Scott Stringfellow, a regional brokerage concern in Richmond, said his firm had purchased 2.7 million, or about 7 percent, of the Financial Corporation for its clients during the past 12 months. He said he anticipated that short term interest rates would fall another percentage point by early 1986 enabling the financial Corporation to earn $4 a share from operations next

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year.

"It's probably the most explosive, speculative stock on the New York Exchange," Mr. Mills said. "But every day that goes by, the spread gets even bigger. If he has enough time, Popejoy can survive the next upswing in rates."

Financial Corporation's stock closed a $5.75, unchanged, on the New York Stock Exchange today, marginally above the low of $4.375 it had reached on its darkest day, Aug. 16, 1984, after the S.E.C forced the earnings restatement.

Some Applause

The Federal Home Loan Bank Board has said it is pleased by Mr. Popejoy's conservative stewardship of the Financial

Corporation, and is not pressing him to meet the minimum net worth requirement of 4 percent. The Company's net worth, calculated according to regulatory requirements that include subordinated debt plus equity, was $303 million at the end of June, or barely 1 percent of its total liabilities.

Bank board officials declined to comment on what plans, if any, exist for a bailout of the Financial Corporation if rising interest rates force losses that wipe out its capital. Mr. Popejoy said the issue may have been explored in Washington, but added, "I have not been part of those discussions."

Mr. Popejoy said the company was on schedule in meeting his goal of writing $3.5 billion in new mortgages, split

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evenly between fixed and adjustable rates, in 1985. It originated $439 million in mortgages in August, putting this year's total at $1.8 billion. It has also sold nearly $200 million of its bad loans, and Mr. Popejoy is striving to sell a total of $600 million by the end of the year.

Mr. Popejoy, however, can ill afford to unload the property at too much of a discount, since a series of fire sales could quickly use up the company's hugh loss reserves. They totaled $449.4 million at the end of August, down slightly from July.

"If we sell assets at a loss, it would just exacerbate our problems," he said. The company's reserves appear to be "adequate" based on the discounts on

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foreclosed property sold so far in 1985, he added.

Unfinished Business

Mr. Popejoy still has unfinished tasks ahead, including further reductions in the company's mortgage portfolio if rates go lower and in the portion of costly funds purchased in the money markets.

Clearly, however, the Financial Corporation has regained much of the confidence it had lost with depositors. It recently was paying slightly less to attract six-month deposit than a few highly profitable competitors in California, according to Robert K. Heady, publisher of the Bank Rate Monitor, of North Palm Beach, Fla.

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Mr. Popejoy takes pride in his progress, but is not yet ready to pronounce the institution home free.

"We've held the company together for our shareholders and depositors," Mr. Popejoy said. "The longer we can do that, the better our chance to collect on the interest rate bet."

Graphic: graph of Financial Corporation's struggle; photo of William J. Popejoy (NYT/Lacy Atkins) (c) 1985 The New York Times, October 9, 1985

SUBJECT: Company and Organization Profiles

ORGANIZATION: FINANCIAL CORP OF AMERICA

NAME: HAYES, THOMAS C; POPEJOY, WILLIAM J

[END OF NYT STORY OCTOBER 9, 1985]

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[Thurston Exhibit 21; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[EXHIBIT D-179 FOR IDENTIFICATION; JOANN WEBER N.P.; DATE 11-9-89; DEPO OF John Turner; DEFENDANTS EXHIBIT D-179]

LEVEL 1 - 4 OF 8 STORIES

Copyright (c) 1985 The New York Times Company; The New York times October 24, 1985, Thursday, Late City Edition

SECTION: Section D; Page 23, Column 1; Financial Desk; Length: 410 Words

HEADLINE: FINANCIAL CORP. NET IS $12.3 MILLION

BYLINE: Special to the New York Times

DATELINE: LOS ANGELES. Oct. 23

BODY:

The Financial Corporation of America today reported income in the third quarter of $12.3 million, or 22 cents a

share, on revenues of $781 million.

While the earnings were cut sharply by a $25.6 million addition to loan loss reserves because of sluggish conditions in the real estate market, William J. Popejoy, Financial Corporation's chairman, said that the company is operating profitably for the first time in seven quarters. Although the company had net income in the 1984 quarter of $1.2 million on revenues of $863.5 million, the profit resulted from the sale of assets.

No Breakdown of Results

The company did not, however, provide a breakdown of profits from operations, as distinct from nonoperating gains.

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The additional loan loss reserves were taken because of an increase in delinquencies and foreclosures on single family mortgages, Mr. Popejoy said, although favorable interest rates allowed the parent company, the American Savings and Loan Association, to turn an operating profit for the quarter. "The overbuilt new and used condominium market is a particular problem," Mr. Popejoy said in a statement.

He added that the company was trying to dispose of its $1.7 billion in nonperforming assets as quickly as possible, and has sold $266 million in foreclosed and investment real estate so far this year.

Primary Earnings Spread Up

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The Company's primary earnings spread, or the difference between the yield of its assets and what it pays on deposits and debts, increased to 2.68 percentage points at Sept. 30. Financial Corporation rose above its break-even point of 2.5 percentage points in August, and increased its lending volume for the quarter to $1.5 billion in loans and mortgage-backed securities that generated $16.1 million in loan fees. Although about 40 percent of the loans originated in the quarter have adjustable rates, fixed rate loans still account for about 90 percent of the company's portfolio.

Wall Street analysts said that the lower cost of funds and increase in loan volume were positive signs, but said that the vulnerability of the nation's largest thrift institution to rising short-term

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interest rates had not changed.

"Financial Corporation's exposure to interest rates is still very large," John Jonathan E. Gray an analyst with Sanford C. Bernstein & Company, said. "A one-point change up or down in rates could double the company's net worth or exhaust it, in less than a year.

SUBJECT: COMPANY REPORTS

ORGANIZATION: FINANCIAL CORP OF AMERICA

[END OF NYT STORY OCTOBER 24, 1985]

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[Thurston Exhibit 16; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[EXHIBIT D-172 FOR IDENTIFICATION; JOANN WEBER N.P.; DATE 11-9-89 DEPO OF John Turner; DEFENDANTS EXHIBIT D-172]

LEVEL 2 - 1 OF 1 STORY

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Business Week; March 10, 1986

SECTION: TOP OF THE NEWS; Corporate Cash; pg. 34; LENGTH: 643 Words

HEADLINE: FCA STILL HAS TO LIVE UP TO ITS STOCK PRICE

BYLINE: By Teresa Carson in Los Angeles

BODY:

Wall Street Jokesters still call it Financial Corpse of American. Yet the stock price of the nation's largest savings and loan association has tripled in the past 12 months to $15 per chair (chart). Investors accurately perceive that Financial Corp. of America benefits

tremendously from the recent plunge in interest rates. But they seem to have forgotten that the hugh problems that pushed it to the brink of failure only 18 months ago persist.

"Its a crazy price," says one investment banker. Another says investors can't possibly be betting on FCA's actual prospects but must be simply counting on their own intuition to sell at a profit before others do the same. "It is just a case of the greater-fool theory," he says.

DOUBLE WHAMMY. FCA Chief Executive William J. Popejoy admits the stock price makes him a little nervous. Although Popejoy has made significant progress, he says FCA's turnaround will take three to five more years. I hope expectations aren't getting too high," he frets. Popejoy is struggling to recover from the double whammy dealt to FCA by

former Chief Executive Charles Knapp , who resigned under fire in August, 1984. Knapp built FCA into the nations biggest thrift by betting big that interest rates would not rise dramatically: He took in short term deposits, paying top market rates, while making stacks of long-term loans at fixed rated. That strategy left FCA with a pile of bad loans from having expanded too quickly -- and vulnerable to a rise in interest rates.

As rates drop, investors reason that FCA should make more money. And it will: The fixed yields on its old mortgages become more attractive, making FCA's interest margin wider and the mortgages more salable. Sales of fixed-rate assets produced a profit of $53.3 million, or $1.01 per share, in 1985. And analysts say FCA could earn as much as $6 per share in 1986. But investors won't see much payoff for years: Any profits will

be plowed back into FCA's capital account, which is still $980 million short of its regulatory capital requirement.

Analysts also worry that if rates go up, FCA will be back in the soup. Popejoy managed to reduce FCA's vulnerability to changes in short-term interest rates -- its asset-liability gap -- from 70% to 59% in 1985. And he says he can do as well again this year. But analysts wonder if the drop in rates will last long enough for him to transform FCA's balance sheet for the long haul. "Even with today's rates, I'm not sure the company can restructure sufficiently," says Jonathan E. Gray of Sanford C. Bernstein & Co.

The market also seems to be ignoring FCA's problem loans. Troubled assets rose to $1.7 billion, or 6.8% of assets, at yearend. "asset quality continues to

be a big unknown," says Jerome I. Baron of First Boston Corp. FCA has some loans in oil-patch real estate, for instance, which can only become shakier as oil prices drop.

Regulators have apparently stymied Popejoy's desire to split FCA into a "clean" S&L and one with questionable assets. He hoped a split would speed the workout of problem loans, cut the funding costs, and maybe make it easier to sell capital or the entire institution. "I give it a 50-50 chance now," he says. Even without the split, Popejoy hopes to sell $600 million of foreclosed real estate this year and expects troubled assets to dip to $1.5 billion.

Analysts acknowledge that Popejoy has made considerable progress at FCA. "He's played out the hand that Charlie [Knapp] dealt him as well as anyone could, says Gray. But most feel FCA

still has too far to go to warrant such enthusiasm for its stock. "How do you place a multiple on a company like this?" Gray asks. The only answer these days is FCA is worth whatever someone is willing to pay. For the moment at least, that is around $15 per share.

GRAPHIC: Chart, FINANCIAL CORP.'S STOCK RIDES UP, DATA: FINANCIAL CORP. OF AMERICA, PATRICE CAIRE

[END OF BW STORY MARCH 10, 1986]

[Thurston Exhibit 23; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[EXHIBIT D-24E FOR IDENTIFICATION; JOANN WEBER N.P.; DATE 11-6-89 DEPO OF John Turner; DEFENDANTS EXHIBIT D-24E]

IN PROBLEM LOANS DESPITE ITS FORECASTS

By Kathleen A. Huges; Staff Reporter of The Wall Street Journal

DATE: April 1, 1986

IRVINE, Calif. - Financial Corp of America, parent of the nation's largest

thrift, disclosed that its problem-loan portfolio continued to grow this year despite the company's earlier forecasts that bad loans would level off.

In a filing with the Securities and Exchange Commission, the company said the problem-loan portfolio, including foreclosed property, climbed to $1.98 billion at the end of February from $1.75 billion at Dec.31

Financial Corp. also disclosed that it restructured another $761.4 million in loans last year to avoid delinquency or foreclosure. The restructuring included $36.5 million in interest-rate concessions last year.

The company said its outside auditors, Peat, Marwick, Mitchell & Co., issued an unqualified opinion after qualifying its opinion of Financial Corp.'s 1984 Annual Report. However, a Peat Marwick spokesman said the

unqualified opinion resulted from a letter of support for Financial Corp.from the Federal Home Loan Bank Board, which promised to "continue to provide support for the company . . . to enable it to continue as a going concern.

The increase in problem loans is a potentially heavy blow to Financial Corp.'s effort to regain its financial health. After a period of very rapid growth Financial Corp. was hurt badly by a growing amount of delinquent loans and real estate in foreclosure. Rising interest rates also weakened the thrift company, which had made many long-term loans funded with short-term deposits. Depositors responded in 1984 by withdrawing hugh amounts from their accounts.

The increase in problem loans is blow to the credibility of William Popejoy, Financial Corp.'s chairman. Mr.

Popejoy repeatedly predicted Financial Corp.'s problem loans wouldn't exceed $1.8 billion. Mr. Popejoy wasn't available for comment yesterday, but a spokeswoman said, "it was bad forecasting on our part."

The spokeswoman said the increase resulted from "certain large construction loans that became delinquent" but said she couldn't be more specific. She also declined to estimate when the increase in problem loans might stop or to say whether the company is likely to increase its loan-loss reserve. "Its something we're continuing to evaluate," she said.

In its restructuring of the $761.4 million in loans, Financial Corp. said it also agreed to lend an additional $121.6 million, presumably to help borrowers make payments.

The Bank Board Letter, dated March 24 and included in the filing, says the

regulators will take action to enable the company to obtain longer-term Federal Home Loan Bank advances and that the Bank Board will permit "prudent additional branching."

The letter notes that Financial Corp. isn't in compliance with regulatory net worth requirements and doesn't have fidelity bond insurance, which is required under federal regulations. However the letter says the Bank Board won't take any supervisory action based solely on those two violations. The letter also says the regulators support the company's efforts to restructure its balance sheet, maintain profitable operations and augment its net worth.

Though the Bank Board has consistently supported the efforts of Mr. Popejoy and his management team, Sam Yellen, a Peat Marwick partner, said the unqualified opinion resulted from the

"supportive letter issued by the Bank Board,"

The SEC filing said the company is still making mostly long-term fixed-rate loans with a primarily short-term deposit base, which leaves it vulnerable to rising interest rates. The filing says that last year Financial Corp. originated and bought a total of $3.3 billion of loans. Of those, $1.7 billion were in residential fixed- rate mortgages. A company spokeswoman said 88% of Financial Corp.'s loan portfolio is in fixed-rate instruments.

The company also said 68% of its deposits had maturities of six months or less as of year's end.

In 1984, the thrift posted a loss of $590.5 million, the largest loss ever for a thrift. But in January, the company reported a profit for 1985 of $53.3 million, or $1.10 a share, despite an

operating loss of $65 million. The 1985 results included a large tax-loss carry forward and hugh gains on the sale of securities.

At Dec. 31, Financial Corp had assets, mostly loans, of $27.3 billion.

[END OF WSJ STORY APRIL 1, 1986]

EXHIBIT D-24E FOR IDENTIFICATION
JOANN WEBER N.P.
DATE 11-6-89
DEPO OF John Turner
DEFENDANTS EXHIBIT D-24E

[Thurston Exhibit 40; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For The Northern District Of California Case No. C-89-2486-MHP]

[EXHIBIT D-28 FOR IDENTIFICATION; Barbara Volzing N.P.; DATE 11-7-89; DEPO OF John Turner; DEFENDANT'S EXHIBIT D-28]

Financial Corp. View
June 12, 1986
Special to the New York times
Nicholas D. Kristof

IRVINE, Calif., June 12 -- The Chairman of the Financial Corporation of America said today that problem loans would rise, possibly substantially, and that the company was unlikely to show an operating profit until at least the end of this year

This bleak assessment by William J. Popejoy, who had been struggling to save the troubled savings and loan company since August 1984, contradicts widespread speculation that the Financial Corporation's worst loan problems were behind it and that profitability was on the rise.

Mr. Popejoy conceded that part of the blame lay with his erroneous estimate

last year that "scheduled items" such as delinquent loans and foreclosed property would peak at about $1.8 billion. They are now around that level-- after reaching nearly $2 billion at one point during the first quarter -- but he said today they "could go substantially higher." He declined to be more specific, citing the inaccuracy of his past predictions.

A rise in scheduled items would mean that the company is foreclosing on property even faster than it is selling it. A newly formed real estate unit will sell about $600 million in property this year, Mr. Popejoy said, but cannot keep up with the rise in foreclosures. He attributed the unexpected rise in problem loans to economic difficulties in oil dependant states, poor estimation by the company of the severity of its portfolio problems, and to regulatory changes that

broaden the definition of scheduled items.

In an interview in the company's headquarters here, an hours drive south of Los Angeles, Mr. Popejoy added: "It's going to be difficult for us to have operating profitability for some time I hope to return to an operating profit by the end of the year, but it's a hope."

The Financial Corporation, which is the parent company of the American Savings and Loan Association, one of the nations largest thrift institutions, reported a modest operating profit in the third and fourth quarters of 1985, feeding speculation that it was in the midst of a lasting turn around.

In the first quarter of 1986 it reported a $7.2 million operating loss, although the sale of securities and a tax-loss carry forward resulted in a net income of $49.1 million.

Mr. Popejoy said he believed that Financial Corporation was still on the mend after a 1984 loss of $590.5 million that set a record in the thrift industry. He noted, for example, that the company was reducing it's sensitivity to any rise in interest rates, although that remained a big potential problem. But the progress was gradual, he said.

'No Quick Fix'

"There is no quick fix for this company that I can see, unless we are acquired by a major corporate entity." Mr. Popejoy said. "Otherwise we're talking about a five-year process." He said he would favor being acquired by a large corporation that could provide an infusion of capital to bolster the Financial Corporation's thin supply, which is below regulatory requirements.

The Financial Corporation is a

legend in the financial world, almost as much for its meteoric rise in the early 1980's as for its sudden near collapse in mid 1984, leading to a run on deposits and the arrival of Mr. Popejoy.

In the interview, Mr. Popejoy said that a committee investigating past company policies may give its report later this year, both to the company's board and to Federal regulators.

Mr. Popejoy also said that the company was cooperating with the Federal Bureau of Investigation and a grand jury, which are looking into the thrift institution's lending policies in the period before the current management was hired.

THE NEW YORK TIMES JUNE 13, 1986

[END NYT STORY JUNE 13, 1986]

EXHIBIT D-28 FOR IDENTIFICATION
Barbara Volzing N.P.
DATE 11-7-89
DEPO OF John Turner
DEFENDANT'S EXHIBIT D-28

[Thurston Exhibit 43; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For The Northern District Of California Case No. C-89-2486-MHP]

[EXHIBIT D-30 FOR IDENTIFICATION; BARBARA VOLZING N.P.; DATE 11-7-89 DEPO OF John Turner; DEFENDANT'S EXHIBIT D-30]

Unit of Financial Corp. of America Sets $3 Billion Swap Pact

By a Wall Street Journal Staff Reporter

July 15, 1986

IRVINE, Calif. -- Financial Corp. of America said its American Savings & Loan Association Unit signed an option agreement to swap $3 billion in home mortgages for a like amount of Federal Home Loan Mortgage Corp. mortgage-participation certificates.

This agreement calls for the mortgage corporation, known as Freddie Mac. to buy fixed-rate mortgages on single family homes from American Savings during the next 18 months, in exchange for participation certificates.

American Savings could sell the certificates to other corporations and, Financial Corp. said, the arrangement

will help increase the liquidity of its unit, the nation's second largest thrift.

Freddie Mac. a publicly chartered corporation that buys mortgages from thrifts and packages them for resale to investors, said the transaction is the largest single swap it has arranged.

It added that it had bought $164 billion in mortgages and sold $151 billion in mortgage securities since being created in 1970.

Financial Corp. said the swap also was its single largest transaction, although it has frequently entered into similar swap arrangements with Freddie Mac and other publicly chartered financial corporations.

A financial Corp. spokeswoman said the instruments to be swapped won't include any of the problem loans that have plagued the thrift holding company.

In April, Financial Corp. said its

problem-loan portfolio climbed to $1.98 billion at the end of February from $1.75 billion Dec. 31. Separately, Financial Corp. said its thrift unit began offering $200 million of European collateralized floating-rate notes due 1996.

Merrill Lynch Capital Markets is the lead underwriter.

[END OF WSJ STORY JULY 15, 1986]

Subsidiary of Financial Corp. of America Lifts Sales of Real Estate

WSJ 7-16-86

By a Wall Street Journal Staff Reporter

IRVINE, Calif. -- Financial Corp. of America said its thrift unit sold $200.5 million of foreclosed real estate in the second quarter, up from sales of $84.4 million in the first quarter.

The real estate was part of American Savings and Loan Association unit's problem-loan portfolio, which climbed to $1.92 billion at May 31 from $1.79 billion in January. June figures aren't yet available, and the company declined to comment on whether the portfolio showed an overall decline as of June 30. The problem loan-portfolio, mainly consisting of slow paying loans and foreclosed property, is the largest of any thrift.

William J. Popejoy, chairman of Financial Corp., has estimated that the thrift will sell $600 million of real estate this year. So the total $284.7 million sold in the first half is in line with expectations.

Financial Corp. said it has an additional $135 million of real estate in escrow. The company attributed the higher sales rate in the second quarter

to a favorable real estate environment and stepped up sales efforts. The company noted, however, that January and February usually are slow months for the sale of real estate.

[END OF WSJ STORY JULY 16, 1986]

[the following was written in long hand under the article]

July 15th, 1986

Bullish news for FIN

65,000 shares continues to be a hold. 2 year range $30 $36 per share value $2,340,000 value @ $36 share vs 612,000 cost. Potential gain at $36 > $1,728,000 less cost to hold > Interest on margin of $300,000 x 10% $30,000 per year.

EXHIBIT D-30 FOR IDENTIFICATION; BARBARA VOLZING N.P.; DATE 11-7-89 DEPO OF John Turner; DEFENDANT'S EXHIBIT D-30

[Turner Exhibit 4; Appellants' Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For The Northern District Of California Case No. C-89-2486-MHP]

[LOGO+] FINANCIAL CORPORATION OF AMERICA

October 28, 1986

Dear Shareholder:

In addition to your Company's third quarter 1986 results, we've enclosed for your information a recently reprinted news story on Financial Corporation of America from the "American Banker," the daily newspaper of the banking and financial services industry.

In particular, please note that FCA now has produced five consecutive quarters of profitability, and that American Savings' regulatory capital has increased to $527.6 million. Also , in regard to the company's ongoing efforts to review the loan portfolio, the company hopes to avoid a large year-end addition to its reserves by reviewing significant portions of its loan portfolio in each of

the second, third and fourth quarters of 1986. The company's goal is to identify and evaluate new problem areas as soon as reasonably practicable.

If you have any questions, please write or phone me at (714) 553-6930.

Thank You, s/ Layna J Browdy

Director of Corporate Communications

LJB/dg

[FOOTER] Financial Corporation of America, 18401 Von Karman Avenue, P.O. Box 19639, Irvine, California 92713-9689, (714)553-6900

[ARTICLE ATTACHED TO LETTER]

[HEADER] American Banker

The Daily Financial Newspaper Established 1836; September 22, 1986

[LOGO] Corporate Strategy

[HEADING] Financial Corp.'s Popejoy Upbeat About Thrift's Future Health

[SUB-HEADING] After Veering Close to Failure's Edge, Nation's Largest Thrift Company Swings Back Toward Growth

By MARK BASCH

[BODY] IRVINE, Calif. -- If William J. Popejoy has his way, the troubled Financial Corporation of America will be a healthy, vibrant, and -- most significantly -- an independent institution three years from now.

The chairman, president, and chief executive officer of the nations largest thrift company said in an interview last week that the company is out of danger but still about three years from being financially sound.

"We're out of harm's way in my estimation," he said. "there's no longer talk of American Savings [Financial Corp.'s savings and loan subsidiary] failing. It's just now how long will it take for this company to fully regain the financial prominence it did prior to the FCA-First Charter merger in 1983."

American Savings and Loan Association was a subsidiary of the First

Charter Financial Corporation. American was merged into State Savings and Loan Association, a subsidiary of Financial Corp., in August 1983. Financial Corp. and American Savings were the surviving companies.

Although Financial Corp. has been the subject of merger rumors over the past year, Mr. Popejoy said he is hopeful that we will still be running the company as an independent institution in the future.

"In my heart of hearts, I hope we can go ahead independently," he said. "We had to do battle through the times of adversity. I'd like to be able to enjoy the fruits of our labors."

He also said he would welcome discussions with possible merger partners that would infuse much needed capital into the company. But "no such discussions have taken place," he said.

Financial Corp.'s problems began in 1984, when it had a loss of $590.5 million. Its ratio of net worth to assets plummeted to 0.68% at yearend 1984, and the company was saddled with $1.1 billion in scheduled items.

The company has been profitable since the end of 1985, but those profits have come mainly on the strength of the sale of loans and mortgage backed-securities.

"We have returned to strong profits, but those profits are from extraordinary income actions." Mr. Popejoy said. "We expect to have an operating income in the fourth quarter" of this year.

Although the earnings have increased net worth, the net worth ratio was still a low 0.98% as of June 30. Financial Corp. is beginning to explore other capital raising techniques, Mr. Popejoy said.

"We had an ongoing relationship with unidentified Wall Street firms regarding ways we can accelerate our rebuilding capital," he said. "It is a process that has begun," he said, but it will be at least several months before any results are seen.

Nonearning Assets a Problem

Besides capital growth, another key problem facing Financial Corp. is the large amount of nonearning assets. Scheduled items totaled $1.8 billion or 6.28% of assets at June 30.

Financial Corp. has created a subsidiary called American Real Estate Group, which has been attempting to dispose of problem real estate assets.

"We have in effect divided the company into two parts," Mr. Popejoy said. "Its a savings and loan and its a real estate company."

The real estate division sold $286 million in real estate in the first six months of this year, and should reach its goal of selling $600 million by year-end, Mr. Popejoy said. "No other financial institution and I don't think many of the other real estate companies have come close to selling that much real estate in a short period of time." He believes it will take three years for the real estate group to complete its job.

Financial Corp. had to add $156.4 million to its loan-loss reserves in the fourth quarter of 1985, and the company is hoping to avoid a large yearend addition to its reserves this year by reviewing its portfolio earlier in the year.

Mr. Popejoy said the company has been reviewing one-third of its portfolio each quarter this year, so the portfolio should be completely audited by the end

of the quarter. Potential decreases in real estate values, however, could still result in increased additions to reserves in the fourth quarter.

The company is also lowering its ratio of scheduled items through growth. Total assets had shrunk from $28.5 billion at yearend 1984 to $27.4 billion at yearend 1985. But over the first six months of this year, assets rose again to $29.2 billion.

"We believe [growth] is in our best interest because we've been growing with earning assets," Mr. Popejoy said. "We need earning assets to help carry our non earning assets until they have been sold off.

He said that since the company rebuilt its lending division in 1985, it has made 18,000 mortgage loans with less than 40 of those being more than 30 days delinquent. Although its still early to

judge that portfolio, "that's an astoundingly low number," he said.

Growth is Approved

Financial Corp. entered into an operating agreement with the Federal Home Loan Bank Board in August 1984, and it has been required to submit a quarterly business plan with the bank board. Although the Bank Board had originally encouraged the company to shrink, it has approved Financial Corp.'s growth this year.

"They've approved what we have one thus far, and that included some growth," Mr. Popejoy said.

The company has benefitted from lower interest rates, but is still very sensitive to increases in rates. Its one year gap, or the difference between assets and liabilities repricing within one year, is a high 35.4% of assets. But

Mr. Popejoy is pleased that the company has cut its one-year gap in half from 69.4% at June 30, 1985.

"I'm not going to be fully happy until we have a 6% net worth, a less-than-industry average scheduled items ratio, and a negative gap that is very close or maybe lower than our peer group," he said. "I think we can do all three of those within three years."

"From the very beginning we've indicated that there was no quick fix for FCA and American Savings," Mr. Popejoy said, adding that he had estimated it would take three to five years from the time he and a completely new management group took over the company in 1984. He feels the company is still on target to reach that goal by 1989.

"We're millenniums ahead of where we were a year and a half ago. At that time, it seemed like failure was

imminent. Now it doesn't even seem like it could be a consideration."

[INSERT] Photograph of Mr. William J. Popejoy with banner "In my heart of hearts, I hope we can go ahead independently. We had to battle through the times of adversity. I'd like to be able to enjoy the fruits of our labors. -- William J. Popejoy Chairman, Financial Corporation of America

[END AMERICAN BANKER ARTICLE SEPT 22,1986]

[THIS AMERICAN BANKER ARTICLE ALSO ENTERED INTO EVIDENCE AS:]

EXHIBIT D-34A FOR IDENTIFICATION
BARBARA VOLZING N.P.
DATE 11-7-89
DEPO OF John Turner
DEFENDANT'S EXHIBIT D-34A

[Thurston Exhibit 47; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For The Northern District Of California Case No. C-89-2486-MHP]

[Turner Exhibit 7; Appellant's Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[Excerpts from the 1986 Annual Statement of Financial Corporation of America released in April 1987]

1986 Building a Stronger Financial Future

Building a Stronger Financial Future

Accomplishments from December 31, 1984 - March 31, 1987:

1. Produced two consecutive years of profitability following the largest loss ever reported by an S & L

2. Reduced the Company's interest rate risk, as measured by the One Year Negative Gap, by approximately two-thirds (One Year Negative Gap declined from 69.4% at mid-year 1985 to 24%)

3. Increased American Savings' regulatory capital by 85%. At March 31, 1987, about

$561 million--up from a low of about $303 million in mid-1985

4. Disposed of real estate totalling approximately $1.2 billion in book value

5. Added a total of over $1.2 billion to the reserve for losses on loans and real estate as a means of providing financial strength for quantifying future loan quality problems

6. Rebuilt the lending operation which since January 1, 1985 has produced approximately 26,000 high quality single family loans(one to four units) through our retail mortgage origination offices. (This excludes loans made to sell our real estate or special loans made to restructure pre-existing problem loans.)

7. Stabilized the deposit base and

dramatically reduced the premium paid on retail deposits

8. Restructured deposit base: Institutional deposits reduced from a high of about 55% at December 31, 1983 to 16% of the total deposit base

9. Increased the size and strength of the retail branch system by acquiring a total of 51 savings offices and $1.7 billion in retail deposits through March 1987, thus increasing the number of retail savings offices by 41%

10. Reduced the General and Administrative expenses by $92 million or 22% in just one year--1985 vs 1984. Disposed of nine company aircraft, 41 condos for staff use and approximately 650 company cars while restructuring the Company. During late 1984 and early

1985, reduced the staff by about 2,700 employees. Converted internal computer operations to an outside servicer for economies of operation, improved operational capabilities and customer service

11. Streamlined the organization and created greater accountability for results and performance at all levels of management

12. Settled a major class action law suit, thus removing a major financial concern regarding litigation

13. Assembled a new management team and restructured the FCA/American Savings board of directors

14. Created the American Real Estate Group, an entity of about 500 employees

staffed with real estate professionals, to apply a builder/developer approach to the Company's real estate disposition and management effort

The financial health of Financial Corporation of America and American Savings and Loan Association continued to improve significantly during 1986. We are encouraged by the many positive signs pointing to a strong recovery, although we recognize that there still is much to be done.

Your management team has set annual and loan term goals in all of the following areas, and in 1986 we made progress in each:

- Increased profitability.
- Reduced interest rate risk.
- Improved asset quality.

- Prudent growth.
- Real estate sales exceed goal.
- Reduced scheduled items.
- Increased regulatory capital.
- Improved deposit base stability.
- Vigorously competing for business.

Increased Profitability

FCA reported a net profit of $95.4 million for 1986, an increase of 79% over the 1985 profit of $53.3 million. In addition, the Company reported a 1986 fourth quarter profit of $23.1 million which included an operating profit of $18.9 million. This represents six consecutive quarters of profitability. While the Company produced an operating loss during the first three quarters of 1986, the losses decreased in size each quarter until the last quarter of the year when an operating profit was

recorded--the first in four quarters.

Reduced Interest Rate Risk

A primary goal since we assumed management of FCA has been to reduce the Company's interest rate risk. While taking steps to improve the Company's asset quality and enhance operating profitability, during 1986 we have strategically managed to reduce the Company's interest rate risk--significantly. In the savings and loan industry, a generally accepted measurement for determining interest rate vulnerability is the One Year Negative Gap--the difference between interest-sensitive assets and liabilities repricing in a one year period. Our One Year Negative Gap was a high 69.4% in mid-1985. In just 18 months, we reduced the ratio to 25.1% at December 31, 1986.

We cut it further to 24.0% at March 31, 1987.

This substantially lower gap indicate that the Company is far less vulnerable to rising rates than it was two years ago and should lessen concerns that the Company is borrowing short and lending long. FCA has shielded itself against much of the risk of interest rate fluctuations through interest rate swaps and hedging operations, techniques widely in use among leaders in the financial industry. (Discussion of this strategy follows in Note 17 of the "Notes to Consolidated Financial Statement"section.) Although we have achieved meaningful progress in this area within a short period of time, we are determined to lower the Company's interest rate risk further during 1987.

Improved Asset Quality

A financial institution is only as sound as its underlying assets. FCA's asset quality has improved measurably both through our retail loan origination program and through the controlled growth of our asset base. After I joined the Company in 1984, I decided to dismantle the lending operation then in place. I hired Michael Durkin, a prominent S&L industry executive with extensive experience managing quality lending operations. Under his direction as chief lending officer, a special team of expert internal loan auditors was put into place to police underwriting quality.

Through the year-end 1986, we have created 26,000 single family loans (one to four units), primarily on homes in California, through our retail mortgage origination offices. (This excludes loans made to sell our real estate or special

loans made to restructure preexisting problem loans.)

The high quality of such loan production is supported by two statistics. Less than 30 of those 26,0000 loans were even one month or more delinquent as of December 31, 1986. Perhaps even more impressive, the average loan to value ratio for those loans is less than 66%, well below the industry average of about 75%.

The other assets which we've added to the Company's balance sheet are mortgage securities backed by agencies or quasi-agencies of the Federal government--Ginnie Mae, Fannie Mae or Freddie Mac. These present little credit risk to this Company. Clearly, the assets added to our holdings in the last two years are of a very high quality.

Prudent Growth

FCA's assets stood at $33.95 billion, at December 31, 1986, a 3,2% growth on an annualized basis, from about $32 billion back in 1984.

During the first 18 months after I assumed the CEO post, our first priorities were to strengthen the Company's financial position and regain the confidence of customers and investors. We then realized that we needed a course of prudent growth to increase operating income and to reduce interest rate risk.

This growth was approved in advance by the Federal Home Loan Bank Board. Our growth was achieved through a dual strategy: to acquire mortgage-backed securities, which represent little or no

risk to the company, and to originate higher quality loans described above.

Our growth added to operating income, while at the same time, reduced our exposure to interest rate risk. For example, our assets grew from $29.2 billion at June 30, 1986 to $33.95 billion at December 31, 1986. This one year negative gap dropped from 35.4% at June 30, 1986, to 25.1% at December 31, 1986. By March 31, 1987 we pared it further to 24%.

Real Estate Sales Exceed Goal

Since mid-1985 American successfully sold over $1.2 billion in book value before reserves of inherited problem real estate. These dispositions escalated dramatically since May 1986, when we created the American Real Estate Group

(AREG), a division headed by Merrill Butler, a respected veteran of the real estate building/development industry and a former president of the National Association of Home Builders, AREG delivered outstanding results by year-end 1986. It disposed of real estate totaling $725.2 million in book value and exceeded the Company's $600 million 1986 sales goal by 2.1%. A dollar volume like this ranks AREG among the top real estate development companies in the nation. In fact, American Savings really functions as "two" companies--an S&L and a real estate company dedicated to turning non-performing assets into earning assets.

AREG had been most successful at selling single family homes and individual condominiums, with the majority of those sold located in California followed by Texas, Oregon,

Nevada and other sunbelt and oil-patch states.

In 1986, AREG achieved a 20% reduction from 1985 in the Company's inventory of real estate owned through foreclosure (REO) and real estate acquired for investment (REI). During the second half of the year, our real estate management and disposition specialists were able to dispose of problem real estate, from our inherited loan portfolio, much faster than the inflow of foreclosed properties.

Reduced Scheduled Items

We will continue our major thrust to reduce scheduled items (primarily foreclosed real estate and delinquent loans). In 1986, scheduled items were cut to $1.66 billion or 4.89% of total

regulatory assets at December 31, 1986 from $1.75 billion or 6.38% at December 31, 1985. The December 1986 scheduled items reduction was down 16% from a high of $1.98 billion at February 28, 1986.

During 1986, the Company added a total of $463.8 million to its previously established reserve for losses on loans and real estate. This addition brought the reserve to $799.7 million at year-end 1986. Since 1984, the Company has set aside approximately $1.2 billion in this reserve in a determined effort to quantify loan quality problems and build a strong reserve for the future.

Increased Regulatory Capital

Our profits have strengthened the Company's capital position, substantially. American Savings'

regulatory capital base has continued to improve and rose to $552 million at year-end 1986. This is an increase of 82% from a low of bout $303 million in mid-1985. With our credible record of recovery and given time to work out the remaining inherited problem assets, American Savings should reach the point where it can negotiate from strength for fresh private capital.

Increasing our capital base remains a top priority. One potential means of raising fresh capital could be through the issue of new shares to and/or the merger of the Company by another corporation.

Your management and directors would only consider such steps if it would create substantial fresh capital strength and would serve the best interests of our

shareholders customers and employees.

As we announced earlier, such talks have been extremely tentative in nature. We will always disclose promptly any new and important information.

Improved Deposit Base Stability

During 1986, we continue our program to reduce the Company's past dependance on volatile institutional deposits and to gain a more cost-effective, stable, manageable and dependable deposit base. The leading edge of this effort has been the Company's total acquisition to date of 51 retail branch offices and about $1.7 billion in deposits since the summer of 1985 through the first quarter of 1987. Located in California, these branch acquisitions have increased the strength and customer service

capabilities of our branch system by 41%.

The Company also continued to reduce the premium it had been paying on institutional deposits. The result of this two-pronged strategy was to reduce the Company's institutional deposit base from a high of about 55% at year-end 1983 to 17% three years later.

Vigorously Competing for Business

We continued to offer products and services which are desired by consumers, and we attract new customers while strengthening relations with current customers. With American's financial strength on the mend, we added a new plank to our program with our new "no negative amortization" ARM. However, we will continue to make available to our customers a fixed rate mortgage program -

- we believe the consumer should be offered a choice.

On the savings side of business, we will continue to seek appropriate opportunities to refine and strengthen our retail branch system. Shortly, we will introduce a new sales and service training program to every savings branch employee. This far reaching training effort will provide and reinforce a new attitude toward customers while totally changing the culture of our savings division. At the same time we are moving forward with new products and expanded research and development programs. With a new attitude, training and the best products and services available, we are preparing our employees for the 1990's and beyond. We expect this new training program will further enhance productivity and profitability.

We have come a long way together. We can look back and see our accomplishments and measurable improvement, which we achieved without tapping taxpayer dollars from the Federal Savings and Loan Insurance Corporation (FSLIC). But the job is not yet complete. We continue to appreciate your support and that of our employees and customers. We remain committed, single minded and determined in our drive for FCA's complete renaissance.

S/William J. Popejoy

Chairman of the Board

March 31, 1987

[End of Turner Exhibit 7; Appellant's Excerpts of Record On Appeal;]

[Turner Exhibit "E"; Appellants' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[Excerpts from the 111 pages of the Proof of Loss containing 15 Schedules setting for details of losses in excess of $400 million]

PROOF OF LOSS

Proof of loss is hereby made on behalf of Financial Corporation of America (FCA) and each of its affiliates and subsidiaries as identified in the policies as an insured (hereinafter collectively referred to as the "Company") pursuant to the terms of Policies No: BM10016 (Mutual Fire, Marine and inland Insurance Company; JO 07 25 699 (Insurance Company of North America); and HF 6403460 (Fireman's Fund Insurance Company) for losses sustained by the Company in excess of $400 million.

Various components of the loss, and the conduct directly causing such loss, were discovered by the Company at various times following the resignation of the Company's former chief executive, Charles W. Knapp, on August 28, 1984 as a result of the receipt and evaluation of certain investigations undertaken by new management. Thus it is impossible to pin- point a particular "date" of "discovery" other than a general reference to the period commencing with the fourth quarter of 1984 through mid November 1985.

This Proof of Loss is being signed on behalf of the Company by William J. Popejoy, Chairman of the Board and Chief Executive Officer, who was appointed August 28, 1984. Because the events which are the basis of this claim occurred prior to commencement of his tenure with the Company Mr. Popejoy does

not have personal knowledge of much of the information presented herein and has relied heavily upon information provided from sources both within and without the Company's organization, including counsel for the Company and committees appointed for the purpose of investigating the past practices of former management and the nature and extent of the Company's losses. Accordingly, this Proof of Loss is being made on information and belief and represents the opinion of senior management of the Company with respect to the matters set forth herein.

As set forth in the accompanying Statement in Support of Proof of Loss and schedules (which are incorporated herein), the Company believes that much of its losses were as a direct result of conduct on the part of Charles W. Knapp, the Company's former Chairman and Chief Executive Officer, and certain former

officers, directors and employees of the Company, who aided , abetted and assisted Knapp in the formulation, implementation, and facilitation of Knapp's various schemes and strategies as described herein and who assisted in the concealment of such conduct from those members of the Board of Directors of the Company and its subsidiaries not in collusion with them. Such conduct is believed to be within the applicable Insuring Agreements of the Policies, including, but not limited to, the fidelity Insuring Agreement.

Additionally, separate claims are set forth with respect to conduct falling within the scope of other insuring agreements, including, but not limited to, the Forgery and All Risk Securities Insuring Agreements and (with respect to Mutual) the Servicing Contractor Riders. (Additional proofs of loss will be

provided with respect to other claims of the Company under the respective policies.)

The circumstances surrounding the occurrences of the losses are set forth in the accompanying Statement and Schedules. . . .

Financial Corporation of America

By: s/William J. Popejoy

Sworn to and subscribed before me on the 27th day of June, 1986, at Irvine, California
Monica D. Murray
Notary Public - California
Los Angeles County

STATEMENT IN SUPPORT OF THE PROOF OF LOSS

I. COMMON PLAN OR SCHEME

. . . Commencing as early as 1975-1976, Charles W. Knapp, the principal officer

of the Company, formulated and adopted a scheme and strategy to vastly increase the volume and scope of the Company's publicly reported earnings, assets, and activities in order to inflate the market price of its stock all for his own personal gain and self aggrandizement. At various times, and from time to time, from then until late August 1984, when Knapp resigned his positions with the Company, other officers, directors and employees of the Company knowingly assisted, aided and abetted Knapp by participation in the formulation, implementation and/or facilitation of the various strategies designed to further the scheme and/or in concealing the true facts from those members of the board of directors of the Company and its subsidiaries who were not in collusion with them . . .

Pursuant to this course of Conduct these officers caused the Company, among other things:

(a) To accelerate the generation and recognition of income wherever possible by various stratagems; and

(b) to undertake to postpone the recognition of losses whenever possible.

As an integral part of that strategy, these officers of the Company employed, as they deemed necessary and expedient (e.g., where generally recognized methods of prudent generation and recognition of income did not produce the desired results), artificial and improvident methods of achieving predetermined short-term profit goals which exposed the Company to an extraordinary risk of loss. In doing so, Knapp and these officers, directors and employees acted with a conscious and/or reckless indifference to the potential

long term consequences to the Company. In furtherance of this stratagem:

(a) Knapp and these officers generated a high volume of loan transactions with significant loan fees without adherence to adequate underwriting standards and utilizing appraisals of collateral securing the loans that had no reasonable factual support.

The bulk of these transactions, typically construction or other types of commercial loans, were structured with extensive reserves for payment of interest such that the transaction would be self serving for at least several earnings reporting periods regardless of the condition of the project or borrower at the time. Examples of such transactions as to which a loss has been recognized or as to which a reserve against potential losses has been set are

set forth in schedule 2.

In generating these loans, the Company often obtained higher than market rates of interest. However, these rates, extracted from borrowers because the Company very often was the sole source of funding available for these imprudent loans, were illusionary because the borrower (and/or the income from the proposed project) was incapable of repaying the loan or servicing the debt except through employment of an interest reserve. Another purpose of making these loans was to generate large amounts of origination fees which far exceeded the amounts that would have been paid by credit worthy borrowers.

. . . Further, pursuant to the common scheme, among other things, these officers,

(a) Restructured loans either without current appraisals or using

appraisals that were without any reasonable basis;

(b) Took action to prevent or discourage the generation of information by lower level employees that would have disclosed probable losses;

(c) Engaged in transactions (similar in concept to the Padre Island stock disposal scheme) that were designed to make it look as if the Company had disposed of problem loans and real estate when in truth and in fact the economic risks associated with these problem projects remained with the Company. Moreover, to accomplish this disposal, the Company was put at even greater risk due to the nature of the loans the Company had to make to facilitate these transactions.

. . . (2) To facilitate the disposal of such problem assets, the Company would

grant ancillary or accommodation loans to borrowers without adhering to normal underwriting standards. Ultimate authority for approval of such transactions was placed in the hands if one or more of these principal officers without review of the Senior Loan Committee of the Board of Directors. Frequently the problem loan purchase feature of the transaction was extracted from the borrower because the Company was the sole source of funding available to the borrower. The ancillary loans, which provided the down payment for the purchase of problem loans and real estate, also inherently presented a higher than normal risk of problems (especially if the ancillary loan was a construction loan) since the proceeds of the loans would be used for other than improvements on the property securing the loan.

. . . As a direct and proximate result of the scheme and plan described above to artificially increase the publicly reported earnings of the Company and to hide whenever possible any evidence of problems in the loan portfolio, numerous loans were made and purchased without utilizing proper underwriting standards. The departure from approved underwriting standards included making loans without appraisals, making loans utilizing appraisals known to be without any factual basis and totally bypassing the normal underwriting process.

As a direct result of the scheme and plan described above the Company has suffered damage in an amount in excess of $400 million. . . .

SCHEDULE 2

IMPROVIDENT LOANS

The following loans, among others,

are believed by this Company to have been made without adherence to adequate underwriting standards ad/or utilizing appraisals of collateral securing the loan that had no factual support. In the opinion of the Company, these do not encompass the entire universe of troubled loans within the Company's loan portfolio which are considered to be improvident. . .

Loss/reserve figures given with respect to particular projects represent, generally, information as of December 31, 1985. As more information becomes available, or projects are sold or paid off, these figures could become higher or lower. Some of the transactions identified on this and other schedules bear the notation that the Company is still in the process of quantifying potential/actual losses. As to these transactions further information will be

supplied when available. It should be pointed out that many of such transactions are currently in the process of debt restructure undertaken in an effort to mitigate the potential loss. These restructures can involve, among other things, waiver of accrued interest, discounted principal and/or interest, and/or modification in payment terms, all of which can result in a measurable loss to the Company. As these potential losses are quantified, the information will be provided . . .

[108 loans are then listed of which No. 13 was:]

(13) Rossi (Cannery Row). Loan Number 020-1006563 Total Loss/Loss reserve through 1985, $725,000

[End of selected excerpts from the "Proof of Loss" from:]

[Turner Exhibit "E"; Appellants' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]



[Thurston Exhibit For The Defendants From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

Declaration of Richard B. Swinney

I, Richard B. Swinney, hereby declare as follows:

1. I am an attorney admitted to practice before all of the courts of the state of California and in-house counsel for New West Savings and Loan Association. I was a lawyer in the legal division of American Savings and Loan Association ("American") prior to its being placed into receivership by the Federal Home Loan Bank Board, at which time the Federal Savings and Loan Insurance Corporation was appointed receiver for American. I have been a lawyer for American and its successors/assignees since 1981. I have personal knowledge of the below matters, unless otherwise indicated. I am currently counsel for the New West Federal Savings and Loan

Association, in the position of Senior Litigation Counsel.

2. In the years from 1985 to the present, my job duties included supervision of the Cannery Row Plaza litigation and San Marino Savings and Loan Association litigation discussed herein. As part of that job, I was aware of the loan loss reserves established in connection with loans at issue in those actions.

. . . . .

6. As of July 12, 1986, a loan loss reserve of $2,510,970 was established in connection with the Cannery Row Plaza Loan.

7. As of July 1, 1987, the loan loss reserve was revised to $14,111,405 in connection with the Cannery Row Plaza Loan.

8. As of September 16, 1988,the loan loss reserve was revised to $21,465,231 in connection with the Cannery Row Plaza Loan.

. . . . .

Executed this 16th Day of January, 1990 in Irvine California

s/Richard B. Swinney

[END EXCERPTS FROM SWINNEY DECLARATION]

[From the Deposition of John Turner 11/6/89; Page 98, lines 14-26]

Q To get back to the point, though, is it your contention in this case that the loan loss reserve number appearing in the 10-Q's and 10-K's was inaccurate?

A I don't believe it was accurate at all.

Q Was there some piece of information in the proof of loss as to a dollar number that you feel was not reflected in the 10-Q's and 10-K's?

A The only one that I know anything about would be the Cannery Row Hotel in Monterey which I have alluded to in my transactions, I mean in my briefs that I've filed. The company in the proof of loss set aside a $750,000 reserve for losses in that transaction.

I believe that the losses -- I believe that you have spent more than $750,000 in attorney fees alone in that transaction. That's my belief. And I believe that the losses probably are in the millions on that transaction.

* * *

But again I refer you to Exhibit E in my complaint where there is --

Q Again you're talking about the proof of loss?

A I'm talking about the proof of loss.

Q Okay.

A Where there are hundreds of millions of dollars worth of the loans carried on the books of Financial Corporation as an asset that are -- have loss reserves set aside for them that the company admits not only did Mr. Popejoy, the CEO, know, but that -- that people generally knew in and outside of the company, were fraudulently generated. Fraudulently generated.

So you set aside a loan loss reserve for a fraudulently generated loan? I mean how do you set aside as an accountant a loan loss reserve for a fraudulently generated loan? Number one, you run the risk that the court may set

aside the entire transaction. Number two, you run the risk that there might be as much as treble damages against the company in relation to this asset, so it may be that the asset is no asset at all.

How does the auditor then test for this kind of thing, and what sort of a loan loss writedown are we going to expect in the future? We set aside $750,000, as we did for Cannery Row Hotel, and the claim is that this loan is a fraudulently generated loan.

So now when Peat Marwick sees the $750,000 that the company has set aside as a loan loss reserve, how does Peat Marwick evaluate whether or not this is a proper loan loss reserve? Do we say, well, okay, next year this fraudulently generated loan looks a little worse to us, now we're going to set aside a reserve for $1,250,000 on it?

* * *

Q Was there any dollar figure stated in the proof of loss as to the value of these losses that have been sustained by FCA as a result of whatever was claimed in the proof of loss?

A Do you have a copy of my complaint?

Q I don't have one right here, but you do have a number, don't you? It's 420 million?

A Well, I don't have that number, but as I recall that would not be far from -- it was -- I think it said in excess of $400 million, as I recall.

Q Is it your contention that that $420 million number does not appear in any of the 10-Q's or 10-K's?

A No, it's my contention that that $420 million number, based upon what I know about the Monterey Plaza Hotel, which is only $750,000 of that 420 million, if the Monterey Plaza Hotel

actually represents instead of a $750,000 loss, a several million dollar loss, then using that formula, you could say that if you investigated the other properties, and they came up with the same kind of diverging value, that instead of 400 million, it could be a billion-and-a-half or two billion.

Q So your position is that the amount of the loss as stated in the proof of loss is understated?

A The reserves that are set aside in my opinion are not accurate. But that's not the major criteria. The major criteria is --

Q Mr. Turner, I need to kind of go one step at a time.

A All right.

Q There is a number in the proof of loss that is claimed to be the loss, is

that not correct?

A It says in excess of $400 million, yes.

Q Is it your position that that $400 million number, whatever it may be exactly, is understated?

A That's my belief.

Q It is not your contention that the $420 million number did not make it into a 10-K, is it?

A I never saw it in a 10-K.

Q Are you sure of that?

A What I saw was no reference in the 10-K to the fact that the company had filed with their insurance carriers a claim in excess of $400 million for losses incurred by Financial Corporation of America due to fraud in the loan portfolio believed to have been

instigated by former management.

[Deposition of John Turner 11/9/89; Page 99, lines 24, to Page 102, line 15]

[FROM THE ORAL ARGUMENT OF PETITIONER TURNER BEFORE THE NINTH CIRCUIT AUGUST 20, 1991.]

A perfect example of this is Cannery Row loan. They knew it was improvident and listed it as improvident in the proof of loss - yet they carried it along only setting up a reserve for lost interest during the period they did not want American to fail but wanted it to show assets (even if they were phantom assets) to keep it from failing. So for the first 9 months between November 1985 to July 12, 1986, they were carrying it on the books with a reserve of $750,000. Then for the next year until July 1, 1987 they

carried it with a reserve of $2.5 million. So for the first 21 months they carried it with a reserve not exceeding $2.5 million. Then, on July 1, 1987 they suddenly raised the loss reserve to $14.1 million.

It is no coincidence that also on July 1, 1987 Chairman Popejoy announced a probable increase in loan loss reserves of $150 to $200 million which was in tandem with FHLBB statements that they intended to sell American and the stock price fell by almost 50%.

What I now believe discovery would show is that they decided to increase the reserve for a lot of the improvident loans at that time because they knew that they were going to seize American and wanted it's stock price to fall from the inflated values it was sustaining in the market due to the Glowing 1986 Annual Report which was released to shareholders

in April of 1987.

That same Cannery Row Loan had a loss reserve of $21.4 million a year later after American was seized and sold to Bass. So it jumped from 2.5 million to 21.4 million in a year - simply a question of when you decided to take out the pen and write it down to the value you always knew it to be. By the way this loan was only a $42 million loan to start so they lost not only the interest but 1/2 the principal as well.

Notice First) - that the Proof of loss does not even include all the loans considered improvident. Second) - notice that they differentiate between a troubled loan and a troubled loan that is considered improvident. Every one knew FCA had troubled loans due to the reason they <u>loudly</u> reported - everyone did not know that FCA had a significant number of improvident loans and fraudulent assets

among the troubled loans in its portfolio because they did not report it. Further, all the improvident loans are not listed in the proof of loss. And simple mathematics shows how poorly the District Court reasoned when it improperly weighed the evidence in the proof of loss and determined that it was substantially the same as the $422 million year-end reserve amount revealed in the 1985 10-K. If all of the loan losses listed in the proof of loss were understated by 28 times the amount of the actual loss like the Cannery Row loan - then the impact of the proof of loss would be 28 x $422 million or $11.8 billion. But we now know it was more in the neighborhood of from $3 to $4 billion from recent disclosures. Enough to make FCA/American insolvent at all times after they were discovered if they had been properly accounted for.

It becomes a material fact, for a

jury to decide, if the year-end report in 1984 of $422 million in losses was in fact a report of the financial impact of the proof of loss. The District Court improperly and poorly weighed the evidence to hold that it did - I say it did not and the "Proof of Loss" itself shows that it did not - and simple logic from the Cannery Row Loan example confirms it. So It becomes a disputed fact for proof to a jury.

Oral Argument by John Turner August 20, 1991 before the 9th Circuit



[EXCERPTS FROM PEER REVIEW OF THE FEDERAL HOME LOAN BANK OF SAN FRANCISCO CONDUCTED 1/19/88 THRU 3/11/88]

Significant Supervisory Cases

"Of the 224 total institutions, 48, or 21.4 percent were considered by the Eleventh District to be significant supervisory cases (SSCs) at the initiation of the Peer Review. Detailed information with respect to these institutions is as follows:"

"FHLBB No.	Institution	Total Assets	RAP N/W	GAAP N/W	STATUS
1840	American S&LA	$33,522.0	$281.2	$(783.1)	SSC,RCV,SA"

"Peer Review Corrections and Clarifications Page 6"

"Page 125, paragraph 3, line 4 Should read:" "...the Unit reviews a monthly ..."

"Page 125, paragraph 3, line 5 Should read:" "... from each institution in preparation for attendance at Board meetings."

"Miscellaneous--American and Lincoln"

"page 130, paragraph 2, second sentence"

"Since then, the Agency Group has been able to examine and substantially supervise American, although some direction comes from Washington."

"Reply: This statement is factually incorrect. Since September 1986, the FHLB-SF has not controlled the examination or supervision of American Savings and Loan. On that date, FHLB-SF was notified by Washington that we could not release examination conclusions, nor discuss these matters with American's management without the prior consent of the Chairman. This situation continued through November 1987, at which time another examination was started. The findings of the prior examination were never communicated to the association."

"With respect to supervision, the FHLB-SF has had little involvement since April of

1986, when Chairman Gray and Chief of Staff Fairbanks seized control over the supervisory process. More recently, Agency has not been informed or involved in discussions Washington has had with American management or outside parties on the sale of the association. Most communications of any significance with American management have been made by Roger Martin and Darrel Dochow, and the FHLB-SF has been specifically excluded from these communication. Since the FHLB-SF has been "looped out" by Washington on virtually all matters of significance, we have not been in a position to examine or supervise American effectively, and consistent with our responsibilities."

[Excerpts from page 129-130 of the Peer Review Report]

"12. Miscellaneous -- American and Lincoln

"a. Background"

"There are two Eleventh District institutions that are effectively under the control of the Bank Board/ORPOS. They are American Savings and Loan Association, Stockton California (American) and Lincoln Savings and Loan Association, Irvine, California (Lincoln)"

"With assets of about $34 billion, American . . . As previously noted, the Significant Supervisory Case write-up estimates a $4 billion cost to the FSLIC to resolve this case."

"Because of its size, the Bank Board, under then Chairman Gray, became actively involved in attempts to resolve American's dilemma about two years ago. Since then, the Agency Group has been able to examine and substantially supervise American, although some direction comes from Washington. . ."

[END EXCERPTS FROM PEER REVIEW OF THE FEDERAL HOME LOAN BANK OF SAN FRANCISCO CONDUCTED 1/19/88 THRU 3/11/88]

Turner Exhibit 12; Appellant's Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case 90-15847. From The United States District Court For the Northern District Of California; Case C-89-2486-MHP]

[EXCERPTS FROM THE WRITTEN AND ORAL SWORN TESTIMONY OF M. DANNY WALL, Chairman of the Federal Home Loan Bank Board beginning July 1, 1987 through out the balance of the time covered by this complaint. This testimony was given on November 21, 1989, before the Committee on Banking, Finance and Urban Affairs, U.S. House of Representatives, investigating the Lincoln Savings and Loan Association of Irvine California.]

[From the written testimony: (Asterisks in original document)]

* An examination of the institution begun in 1986 was still pending -- not unlike the situation at Lincoln.

* American continued to suffer periodic liquidity problems. . .

* It was incurring heavy losses and had a $2-$3 billion hole.

We were not concerned just with American and Lincoln . . . We knew these insolvents were a problem, and so we turned a great deal of our attention to resolving them, now that we had money. We set about formulating plans to deal with these institutions in a systematic and effective way."

[From the Oral testimony:]

"In the case of American of Stockton--- when I got to the Bank Board July 1, 1987, I discovered that that office was running American Savings and Loan and I immediately began to undo that. It had been there and it had been run from that office--- and those--- that suite of offices for several years."

"We were watching American in California. Lincoln was just barely on our scope. The situation in American sounds a little bit similar in some ways. The exam had been pending since 1986. The periodic liquidity runs problems came from press reports of one kind or another. There were heavy losses--- they had a $2 to $3 billion dollar hole known at the time."

Turner Exhibit 12; Appellant's Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[Oral Testimony is contained in a video tape, Turner Declaration Exhibit 56, submitted to the District Court, of the November 21, 1989 Hearings before the House Banking Committee. The Written Testimony taken from copy of the text submitted to the House Banking Committee to accompany Mr. Wall's oral testimony. (Both also contained in Appellants Excerpts of Record, Exhibit 12)]

Turner Exhibit 2; Appellant's Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

SUPERVISORY CHRONOLOGY OF AMERICAN SAVINGS from 11/7/80 through 9/15/88 [Prepared by the FHLB-SF for the House Banking Committee Hearings held in San Francisco California January 12 and 13, 1989.]

"10/3/85 The monthly meeting was held with FCA/American management. In its resolution 85-885, the Bank Board indemnified the new directors of American."

"3/29/88 A meeting was held between FCA/American, and representatives of ORPOS, the FSLIC and OGC. Various topics were discussed including indemnification of officers and directors. . ."

[END EXCERPTS OF THE SUPERVISORY CHRONOLOGY]

♦

[Excerpts from Exhibit "A" setting forth the stock prices of FCA; Defendants' Declaration of Candice G. Clark United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[Financial Corp. Stock Prices. Purchases by Petitioner John D. Turner are added to show date, price, and shares purchased]

Date	Volume	High	Low	Close
4/23/86	2550000	15.50	12.25	12.875
4/23/86	5,000 shares Pur avg. 12.52			
4/24/86	2194000	13.00	10.50	11.125
4/25/86	1399800	11.625	10.75	11.00
4/28/86	803400	11.25	10.50	11.50
4/29/86	607300	12.125	11.50	11.625
4/30/86	201300	11.625	11.25	11.375
5/01/86	252000	11.50	11.00	11.125
5/02/86	400700	11.125	10.75	11.00
5/05/86	309600	11.75	10.75	11.75
5/06/86	334800	12.25	12.00	12.25
5/07/86	331400	12.875	12.00	12.625
5/08/86	617800	13.625	12.25	12.25
5/09/86	115200	12.875	12.00	12.75
5/12/86	123600	12.75	12.375	12.50
5/13/86	269000	12.625	12.00	12.50
5/14/86	149600	12.625	12.125	12.25
5/15/86	173200	12.50	12.00	12.125
5/16/86	157400	12.125	11.50	11.625
5/19/86	179000	11.75	11.00	11.00
5/20/86	508300	11.25	10.75	11.125

Date	Volume	High	Low	Close
5/21/86	182500	11.375	10.875	11.00
5/22/86	264900	11.50	11.00	11.50
5/23/86	291600	12.50	11.50	12.255
5/26/86	0	Holiday		
5/27/86	338000	12.625	12.25	12.625
5/28/86	260500	12.875	12.00	12.375
5/29/86	139600	12.125	11.50	11.875
5/30/86	300000	11.75	11.125	11.50
5/30/86	10,000	shares pur at 11.25		
6/02/86	126500	11.50	11.25	11.375
6/03/86	307400	11.375	11.00	11.25
6/04/86	107600	11.50	11.25	11.375
6/05/86	58300	11.625	11.25	11.50
6/06/86	150100	11.50	11.25	11.375
6/09/86	261700	11.25	10.875	11.00
6/10/86	131300	11.25	10.875	11.25
6/11/86	82000	11.25	11.00	11.125
6/12/86	166500	11.25	10.875	11.00
6/13/86	1280900	10.25	9.125	9.375
6/13/86	20,000	shares pur avg 9.31		
6/16/86	833100	9.25	8.50	8.75
6/16/86	20,000	shares pur avg 8.69		
6/17/86	635800	8.875	8.125	8.125
6/18/86	1205900	8.25	7.25	8.00

Date	Volume	High	Low	Close
6/18/86	20,000	shares pur avg 7.75		
6/19/86	629100	8.375	7.625	8.125
6/20/86	329900	8.375	8.00	8.25
6/23/86	626900	9.125	8.125	9.00
6/24/86	572800	9.25	9.00	9.125
6/25/86	290200	9.25	8.75	8.875
6/26/86	182600	8.875	8.375	8.375
6/27/86	245800	8.625	8.50	8.50
6/30/86	193900	8.875	8.625	8.75
7/01/86	249900	9.25	8.625	9.125
7/02/86	225600	9.125	8.875	9.00
7/03/86	551900	9.75	8.875	9.75
7/04/86	0	Holiday		
7/07/86	340600	9.75	9.00	9.125
7/08/86	265400	9.00	8.375	8.75
7/09/86	356500	9.25	8.375	8.75
7/10/86	157300	9.375	9.00	9.125
7/11/86	207500	9.375	8.875	8.875
7/14/86	332400	9.50	8.875	9.375
7/15/86	251600	9.375	9.00	9.125
7/16/86	308700	9.25	8.875	9.00
7/17/86	140800	9.25	9.00	9.25
7/18/86	115600	9.375	9.00	9.25
7/21/86	130200	9.25	9.25	9.125
7/22/86	137700	9.125	8.875	9.00
7/23/86	372900	9.375	8.50	8.625
7/24/86	147500	8.75	8.625	8.75
7/25/86	75900	9.00	8.75	8.875
7/28/86	99000	8.875	8.625	8.625

Date	Volume	High	Low	Close
7/29/86	73300	8.75	8.625	8.625
7/30/86	212100	8.625	8.375	8.625
7/31/86	90600	8.50	8.25	8.375
8/01/86	193800	8.25	7.875	8.125
8/04/86	175000	8.125	7.875	8.00
8/05/86	112700	8.25	7.875	8.00
8/06/86	92800	8.125	7.875	7.875
8/07/86	190800	8.25	7.75	8.00
8/08/86	133400	8.00	7.75	7.75
8/11/86	168200	8.25	7.875	8.25
8/12/86	198400	8.75	8.125	8.75
8/13/86	216300	8.875	8.375	8.875
8/14/86	111200	8.875	8.50	8.625
8/15/86	63000	8.625	8.50	8.625
8/18/86	153400	8.75	8.375	8.75
8/19/86	173600	9.125	8.50	9.00
8/20/86	167700	9.375	9.00	9.25
8/21/86	109700	9.375	9.00	9.00
8/22/86	95600	9.00	8.875	9.00
8/25/86	44100	9.00	8.00	8.875
8/26/86	55800	9.00	8.75	8.875
8/27/86	37300	9.00	8.75	8.875
8/28/86	149700	9.25	8.625	9.00
8/29/86	142300	9.25	9.00	9.00
9/01/86	0	Holiday		
9/02/86	83900	9.125	8750	8.75
9/03/86	44700	8.875	8.625	8.625
9/04/86	161400	8.75	8.25	8.50
9/05/86	137100	8.625	8.375	8.50
9/08/86	108600	8.625	8.25	8.375
9/09/86	44100	8.50	8.25	8.375
9/10/86	99700	8.50	8.00	8.25

Date	Volume	High	Low	Close
9/11/86	206900	8.25	7.625	7.75
9/12/86	231800	7.75	7.375	7.50
9/15/86	248100	7.75	7.50	7.50
9/16/86	131100	7.875	7.50	7.875
9/17/86	107700	7.75	7.50	7.55
9/18/86	171800	7.625	7.50	7.625
9/19/86	406100	7.625	7.25	7.375
9/22/86	127800	7.75	7.25	7.75
9/23/86	174700	7.75	7.25	7.50
9/24/86	271000	7.75	7.25	7.25
9/25/86	172700	7.375	7.00	7.125
9/26/86	195800	7.50	7.125	7.50
9/29/86	95600	7.50	7.25	7.375
9/30/86	122700	7.75	7.50	7.50
10/01/86	117500	7.75	7.50	7.50
10/02/86	55700	7.50	7.25	7.50
10/03/86	68900	7.50	7.375	7.375
10/06/86	73400	7.625	7.375	7.50
10/07/86	254100	8.125	7.50	8.00
10/08/86	285000	8.25	7.75	8.125
10/09/86	144900	8.125	7.25	7.75
10/10/86	97800	7.875	7.625	7.75
10/13/86	65800	7.875	7.50	7.875
10/14/86	57400	7.875	7.625	7.75
10/15/86	80600	7.875	7.50	7.625
10/16/86	123900	7.75	7.375	7.50
10/17/86	233100	7.75	7.375	7.625
10/20/86	95800	7.625	7.375	7.375
10/21/86	108500	7.50	7.25	7.375
10/22/86	238700	7.50	7.25	7.375
10/23/86	347400	7.50	7.00	7.25

Date	Volume	High	Low	Close
10/24/86	124400	7.50	7.25	7.375
10/27/86	108700	7.50	7.375	7.375
10/28/86	83700	7.50	7.25	7.375
10/29/86	61600	7.50	7.375	7.50
10/30/86	134900	7.75	7.375	7.625
10/31/86	128400	7.625	7.375	7.375
11/03/86	123100	7.625	7.375	7.625
11/04/86	74100	7.625	7.505	7.50
11/05/86	134800	7.625	7.375	7.50
11/06/86	121900	7.625	7.125	7.125
11/07/86	66100	8.375	7.625	8.125
11/10/86	139700	7.50	7.25	7.375
11/11/86	178900	7.50	7.25	7.25
11/12/86	89600	7.25	7.125	7.125
11/13/86	295600	7.25	6.875	7.125
11/14/86	104000	7.125	6.875	7.125
11/17/86	191900	7.25	7.00	7.125
11/18/86	128899	7.25	7.00	7.00
11/19/86	75800	7.125	7.00	7.125
11/20/86	94600	7.125	7.00	7.125
11/21/86	352700	7.375	7.00	7.25
11/24/86	60700	7.375	7.125	7.25
11/25/86	98100	7.25	7.00	7.25
11/26/86	76700	7.25	7.125	7.125
11/27/86	0	Holiday		
11/28/86	89900	7.25	7.00	7.25
12/01/86	65200	7.255	7.000	7.125
12/02/86	199900	7.255	7.00	7.25
12/03/86	73600	7.255	7.125	7.125
12/04/86	478200	7.75	7.125	7.75
12/05/86	278100	7.875	7.50	7.625

Date	Volume	High	Low	Close
12/08/86	256500	7.75	7.50	7.75
12/09/86	144500	7.75	7.50	7.75
12/10/86	114200	7.625	7.375	7.50
12/11/86	109500	7.50	7.375	7.50
12/12/86	107900	7.50	7.125	7.25
12/15/86	305900	7.25	7.00	7.123
12/16/86	169700	7.375	7.125	7.375
12/17/86	1238400	8.375	7.75	8.25
12/18/86	321200	8.50	8.125	8.125
12/19/86	320500	8.25	7.75	7.875
12/22/86	172700	8.00	7.75	8.00
12/23/86	265400	8.00	7.75	7.875
12/24/86	141100	7.875	7.625	7.625
12/25/86	0	Holiday		
12/26/86	84600	8.00	7.625	7.875
12/29/86	134100	8.00	7.75	7.75
12/30/86	194800	7.75	7.50	7.50
12/31/86	222500	7.625	7.50	7.50
1/01/87	0	Holiday		
1/02/87	98700	8.00	7.625	7.875
1/05/87	256800	9.00	7.875	8.125
1/06/87	708000	9.00	8.25	8.625
1/07/87	193700	8.625	8.375	8.50
1/08/87	120400	8.75	8.50	8.625
1/09/87	103000	8.625	8.375	8.625
1/12/87	169300	8.625	8.375	8.50
1/13/87	421600	9.125	8.375	9.00
1/14/87	204600	9.00	8.50	8.625
1/15/87	140200	8.75	8.50	8.50
1/16/87	164100	8.625	8.375	8.50
1/19/87	126600	8.875	8.375	8.75
1/20/87	365400	9.00	8.625	8.75

Date	Volume	High	Low	Close
1/21/87	611500	9.375	8.625	9.375
1/22/87	1096300	10.25	9.375	10.25
1/23/87	461400	10.375	9.00	9.375
1/26/87	266700	9.375	9.00	9.25
1/27/87	177700	9.625	9.125	9.625
1/28/87	208000	9.625	9.25	9.625
1/29/87	345700	9.50	9.25	9.25
1/30/87	571700	9.25	8.75	8.75
2/02/87	367000	8.875	8.50	8.625
2/03/87	344800	8.75	8.125	8.375
2/04/87	147400	8.625	8.375	8.50
2/05/87	264000	9.00	8.50	8.875
2/06/87	358100	9.375	8.75	9.125
2/09/87	266400	9.125	8.625	8.75
2/10/87	421000	8.75	8.125	8.375
2/11/87	279200	8.625	8.25	8.25
2/12/87	198700	8.625	8.25	8.25
2/13/87	365900	8.50	8.125	8.375
2/16/87	0	Holiday		
2/17/87	323500	8.50	8.125	8.25
2/18/87	247800	8.375	8.125	8.25
2/19/87	302300	8.875	8.125	8.75
2/20/87	155000	8.75	8.625	8.75
2/23/87	129900	8.75	8.375	8.50
2/24/87	239400	9.00	8.625	8.875
2/25/87	485100	9.125	8.625	8.75
2/26/87	86700	8.75	8.50	8.75
2/27/87	95400	8.75	8.50	8.75
3/02/87	106400	8.875	8.50	8.50
3/03/87	109700	8.75	8.50	8.75

Date	Volume	High	Low	Close
3/04/87	299800	9.125	8.625	9.125
3/05/87	473200	9.375	9.125	9.125
3/06/87	167800	9.25	9.00	9.125
3/09/87	151400	9.00	8.75	9.00
3/10/87	161000	9.375	8.875	9.375
3/11/87	153600	9.375	9.125	9.25
3/12/87	134500	9.375	9.00	9.25
3/13/87	63100	9.375	9.00	9.00
3/16/87	142900	9.25	8.875	9.125
3/17/87	61800	9.25	9.00	9.25
3/18/87	274300	9.375	9.125	9.375
3/19/87	927500	10.125	9.375	9.375
3/20/87	559100	10.125	9.75	9 75
3/23/87	903000	9.75	9.00	9.00
3/24/87	442800	9.125	8.625	8.625
3/25/87	504400	8.875	8.125	8.50
3/26/87	413600	8.625	8.25	8.375
3/27/87	239500	8.375	8.125	8.375
3/30/87	538400	8.25	7.625	8.00
3/30/87	10,000	shares pur at 7.875		
3/31/87	399600	8.125	7.625	8.00
4/01/87	333800	7.75	7.50	7.75
4/02/87	178400	7.75	7.50	7.75
4/03/87	146700	8.125	7.625	8.125
4/06/87	139200	8.50	7.75	8.00
4/07/87	193200	8.00	7.375	7.75
4/08/87	137000	7.75	7.625	7.75
4/09/87	307100	7.75	7.50	7.625
4/10/87	294000	7.625	7.375	7.375

Date	Volume	High	Low	Close
4/13/87	179100	7.625	7.125	7.125
4/14/87	346700	8.375	8.00	8.25
4/14/86	5,000	shares pur at		7.25
4/15/87	116100	7.375	7.125	7.375
4/16/87	110800	7.50	7.25	7.375
4/17/87	0	Holiday		

[End excerpts from Declaration of Candice Clark]

Thurston Exhibit 12; Appellee's Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

[Pertinent Excerpts below are from the above exhibit]

MAY 16, 1986

SAVINGS & LOAN INDUSTRY

It looks as though 1986 will be even better than last year for the savings and loan industry. Interest rates are lower and we think that small downward movements in rates will be the order of the day for the balance of the year, in contrast to the sharp drops of the past six months.

VALUE LINE

FIN'L CP. AMER. NYSE - FIN

MAY 16, 1986

RECENT PRICE 13 TIMELINESS 2

SAFETY 5

BETA 2

1988-90 Projections

Price	Gain	Ann'l Return Total
High 30	(+130%)	24%
Low 17	(+ 30%)	8%

Financial Corp. of America's March Quarter earnings were not of the highest quality. The Company reported net income of $31.4 million, or 74¢ per share. But $85.5 million in gains from sales of loans and mortgage backed securities produced all of the earnings. (The Company also realized a $17.7 million extraordinary gain from the use of tax-loss carryforwards). The investment community typically takes a dim view of profits from such sources. Indeed, upon disclosure that FCA had actually posted a $7.2 million pretax loss ex the gain on asset sales, its shares fell about 17% This loss was triggered by provision for losses on loans and real estate, which

bolstered the reserve to $570 million.

FCA recently created the American Real Estate Group, a division of American Savings and Loan. The new unit will manage $1.85 billion problem-loan portfolio and $800 million in currently performing construction loans. It is modeled after a task force that sold over $400 million in real estate loans last year. The Company intends to sell an additional $600 million of loans this year.

The balance sheet is being refurbished. FCA is replacing its short term institutional deposits with long term advances from the Federal Home Loan Bank. This strategy narrows the company's mismatch of rate sensitive liabilities over assets. In the 12 months ended March 31, 1986 the above gap on the one year basis was closed to $13.7 billion from $19.0 billion.

These shares are risky. FCA's loan portfolio favors fixed rate mortgages by a ratio of almost nine to one. A continued low interest rate environment could drive earnings to near record levels and lead to exceptional capital gains by decades end. Conversely, the consequences of a sudden surge in interest rates (which we're not forecasting) could be devastating, especially since the loan portfolio already is poor. So these extremely volatile shares warrants a cautious approach even though they're ranked highly for timeliness.

[END VALUE LINE EXCERPTS]

[Turner Exhibit 21; Plaintiff's Uncontroverted Facts From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

FCA NEWS

Corporate Offices Financial Corporation of America, 18401 Von Karmon Avenue PO Box 19689 Irvine California 92713 9689

Contact Layna J. Browdy (714)553-6930

IRVINE, CA April 23, 1986 Financial Corporation of America (NYSE FIN)

[Paragraphs 3; page 1 of News Release]

"During the first quarter of this year, we were very pleased to receive demonstrably strong support and cooperation from the Federal Home Loan Bank Board through an official letter of support from the Chairman of the FHLBB and the issuance of an unqualified auditors' opinion from our outside auditors, Peat, Marwick, Mitchell & Co., for the Company's 1985 financial statements. We believe this is yet another sign of the Company's rebounding

performance. This, coupled with our accomplishments and efforts to stabilize and revitalize the overall operation, firmly indicates that the Company is moving toward a normalized savings and loan operation," said Popejoy

[Page 3, Para. 2; page 1 of News Release]

American Savings regulatory net worth increased 54.6 percent to $506.5 million at March 31, 1986 compared with $327.7 million at March 31, 1985. FCA's net worth was $276.2 million and $149.6 million respectively for the comparable period. Total assets were $26.4 billion at March 31, 1986, down from $28.0 billion at March 31, 1985 and down from $27.4 billion at December 31, 1985.

[END IRVINE, CA April 23, 1986 Financial Corporation of America News Release]

[Thurston Exhibit 45; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

FCA NEWS

Corporate Offices Financial Corporation of America, 18401 Von Karmon Avenue PO Box 19689 Irvine California 92713 9689

Contact Layna J. Browdy (714)553-6930

IRVINE, CA July 23, 1986 Financial Corporation of America (NYSE FIN)

[Paragraphs 3-5; page 1 of News Release]

"The favorable interest rate environment continues to provide opportunities for the Company to make significant progress in most facets of our business. I believe the company as a whole is in better overall financial condition today than it's been at any point since 1984. Even though we made substantial addition to our reserve for losses on loans and real estate, this was done not only because it was necessary and prudent but

because it helps provide financial muscle for future corporate strength." said William J. Popejoy, chairman and chief executive officer of FCA and its principal operating subsidiary, American Savings and Loan Association.

According to Popejoy, further additions to the reserve for losses on loans and real estate were appropriate largely due to continuing deterioration of real estate values in certain oil and agricultural dominated markets. We are continuing to review the Texas real estate market where values have slid downward from appraised values which were done only six to eight months ago. He also noted that the real estate market remained flat in San Joaquin Valley of California which is agriculturally oriented and also the location of a portion of real estate owned by the Company.

Scheduled items at June 30, 11986 were reduced to $1.83 billion or 6.28 percent of total regulatory assets down from $1.92 billion or 7.10 percent at May 31, 1986. Scheduled items at March 31, 1986 were $1.85 billion or 7.00 percent of total regulatory assets.

. . . American Savings regulatory net worth increased 69 percent to $511.62 million at June 30, 1986. . .

. . .Popejoy cites several key areas of operation which have experienced notable improvement over approximately the past two years. . ."The outlook for this company is positive. Yes we have problems but we believe they are manageable," said Popejoy. . .

Stockholder Equity

December 31, 1985 $229,728,000

Stockholder equity

June 30, 1986 $284,849,000

[END IRVINE, CA July 23, 1986 Financial

Corporation of America News Release]

EXHIBIT D-32 FOR IDENTIFICATION
BARBARA VOLZING N.P.
DATE 11-7-89
DEPO OF John Turner
DEFENDANT'S EXHIBIT D-34A

[Thurston Exhibit 52; Appellees' Supplemental Excerpts of Record On Appeal; United States Court of Appeals for the Ninth Circuit; Case No. 90-15847. From The United States District Court For The Northern District Of California Case No. C-89-2486-MHP]

FCA NEWS

Corporate Offices Financial Corporation of America, 18401 Von Karmon Avenue PO Box 19689 Irvine California 92713 9689

Contact Layna J. Browdy (714)553-6930

IRVINE, CA January 29, 1987 Financial Corporation of America (NYSE FIN)

[Paragraph 3; page 1 of News Release]

"As we had previously projected, we are pleased to report an operating profit during the past quarter and attribute this result to the approximately $5.75 billion increase in the mortgage backed securities portfolio at the end of the

third quarter of 1986. That strategic move was not an interest rate bet. To the contrary it was planned asset growth to generate solid net interest income which also was designed to hedge against higher interest rates. . ." said William J. Popejoy . . . "This substantially reduced gap, coupled with our growth, means that today the Company is far less vulnerable to rising rates than it was two years ago. . ." he said.

"Our American Real Estate Group has achieved outstanding results by far exceeding their ambitious 1986 sales goal. In fact the Company has sold real estate totalling $1.1 billion in book value in little more than a year-and-a-half. Results like that rank AREG among the top real estate development companies in the nation," said Popejoy.

[Paragraphs 4; page 3 of News Release]

American Savings regulatory capital increased to $552.1 million at December 31, 1986 compared with $453.5 million at December 31, 1985, an increase of 22%. FCA's net worth was $313.9 million and $229.7 million respectively at the comparable dates. Total assets were $33.95 billion at year-end 1986 and $27.4 billion at year-end 1985.

[END IRVINE, CA January 29, 1987 Financial Corporation of America News Release]

EXHIBIT D-55 FOR IDENTIFICATION
BARBARA VOLZING N.P.
DATE 11-7-89
DEPO OF John Turner
DEFENDANT'S EXHIBIT D-55

[Turner Exhibit 42; Plaintiff's Uncontroverted Facts From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

FCA NEWS

Corporate Offices Financial Corporation of America, 18401 Von Karmon Avenue PO

Box 19689 Irvine California 92713 9689
Contact Layna J. Browdy (714)553-6930

[All Paragraphs All pages of News Release]

FINANCIAL CORPORATION OF AMERICA REPORTS PRELIMINARY DISCUSSIONS WITH POSSIBLE BUYERS

IRVINE, CA (March 27, 1987) -- Financial Corporation of America (NYSE: FIN) today reported that it very recently had preliminary talks with parties concerning the possible acquisition of FCA and its principal operating subsidiary, American Savings and Loan Association. The identity of the parties will not be disclosed at this time.

"I want to emphasize that the recent discussions we've had were extremely tentative in nature concerning the

potential purchase of this company. We are publicly sharing this information at this time, because we believe it is appropriate, in view of the current rumor laden atmosphere, to publicly disclose such information -- even if it only is exploratory and may not develop further'" said William J. Popejoy, chairman and chief executive officer of FCA and American Savings.

The Company also said that it is negotiating with a firm to advise and represent FCA regarding potential acquisition matters as they may arise. The identity of the firm was not disclosed.

"The recently circulated rumors regarding the possible purchase of FCA prompted us to seek a firm to help protect and serve our shareholders. As we have said previously, we want to seize and maximize opportunities which are in

the Company's best interests," he said.

"The management and directors of FCA would only consider the sale of this Company under conditions which would create an appropriate amount of additional capital strength and would benefit and serve the best interests of our shareholders, customers and employees," said Popejoy.

"Since 1984, I believe much has been accomplished toward improving the health of this company. We have increased profitability, regulatory capital, real estate sales and the strength of the retail branch system. At the same time, we have reduced the Company's interest rate risk as expressed by our One Year Negative Gap ratio, scheduled items/nonperforming assets, operating expenses and volatile institutional deposit base. Also, the result of our strategies have improved asset quality,

helped stabilize the deposit base and allowed the Company to vigorously compete in the marketplace. The attractiveness of this Company, we believe, has been enhanced through these efforts and points the way to a bright future," said Popejoy.

American Savings, based in Stockton, California, is the nation's largest savings and loan association and operates 172 retail savings branches and 21 loan centers throughout California.

[END IRVINE, CA (March 27, 1987) Financial Corporation of America News Release]

[Turner Exhibit 44; Plaintiff's Uncontroverted Facts From The United States District Court For the Northern District Of California; Case No. C-89-2486-MHP]

FCA NEWS

Corporate Offices Financial Corporation of America, 18401 Von Karmon Avenue PO

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[Paragraphs 6 pages 1 of News Release]

FINANCIAL CORPORATION OF AMERICA REPORTS PROFIT FOR SEVENTH CONSECUTIVE QUARTER

IRVINE, CA (April 22, 1987) -- Financial Corporation

Further progress was achieved in the Company's ongoing reduction of its interest rate risk and additions to American Savings' regulatory capital. The Company's One Year Negative Gap (an industry-wide regulatory measurement of assets and liabilities repricing in a one year period) was reduced to 24.0% Although the Company's One Year Negative Gap remains marginally higher than its largest competitors, this interest rate risk has been dramatically reduced from

its highest level of about 69% in mid 1985 and is down from 51.7% at March 31, 1986.

American Savings regulatory capital has continued to improve and rose to $560.9 million at March 31, 1987. This is an increase of 85% from a low of $303 million at June 30, 1985 and was up 11% from $506.5 at March 331, 1986.

Total assets were $33.859 billion
Total Stockholder Equity $320 million at March 31, 1987.

"In January, we once again received a strong letter of support from the Federal Home Loan Bank Board as a result of FCA/American Savings' continuing financial improvement in all areas of concern. This support essentially extends through the first quarter of

1988. I believe this is important, because it proves that a troubled Savings and Loan with commitment and cooperation between the regulators and the management team of the Company can accomplish improved financial health and recovery of the institution without extending even a dollar from the Federal Savings and Loan Insurance Corporation (FSLIC). American Savings is an example of how well this approach can work," said Popejoy.

"There has been much speculation recently over the potential selling of this company and the role that the FHLBB would play if such a thing were to occur. Unfortunately, very little of this speculation bears any resemblance to reality. For nearly two years, this Company has publicly stated that it would be open to the possibility of a capital infusion through merger...."The

management and directors of FCA would only consider the sale or merger of this Company under conditions which would create an appropriate amount of additional capital strength and would benefit and serve the best interests of our shareholders, customers and employees," said Popejoy.

" With American's financial strength on the mend, in recent weeks we have launched a strong push for a larger share of the Adjustable Rate Mortgage (ARM) market..."

[END IRVINE, CA (April 22, 1987) Financial Corporation News Release]

[Excerpts from Petitioner's complaint referring to attached Exhibit "D", a report prepared for the Use of the Subcommittee on Oversights and Investigations of the Committee of Energy and Commerce U.S. House of Representatives, Dated April 9th., 1987]

"Plaintiff believes and alleges that the FHLBB was a substantial and culpable participant in the schemes and conspiracies as outlined herein and who aided and abetted in a conspiracy of coverup with defendants herein. See Exhibit "D" A report prepared for the Use of the Subcommittee on Oversights and Investigations of the Committee of Energy and Commerce U.S. House of Representatives, Dated April 9th., 1987, and particularly the letter of transmittal from Congressman John D. Dingell, Chairman of the subcommittee on Oversight and Investigations, wherein these findings are made by the congressional sub-committee:

(a) page iii paragraph 4, "Other findings include the Bank Board's knowledge of and involvement in fraudulent securities activities.";

(b) page 3, paragraph 4, "The subcommittee's findings are supported by a substantial record of inaction and non-enforcement by the FHLBB on securities matters, as well as deliberate actions by the agency that resulted in misleading financial reports and apparent violations of the securities laws.";

(c). page 19, paragraph 2 "The subcommittee found that the FHLBB has engaged in a persistent pattern of inaction and non-enforcement, and, when that was not enough, in deliberate actions which culminated in misleading financial reports and apparent violations of securities laws.";

(d) page 21, paragraph 2, "Early warnings were ignored and not publicly reported, effective regulatory actions were not taken, and violations of law and regulations were permitted to continue. In every case, the responsibility to assure open and complete disclosure of material information was subordinated to the FHLBB's desire to hide major problems from the public.";

(e) page 23, paragraph 1, "Ironically, the FHLBB's initial failure to take proper regulatory action at American (American Savings and Loan of Florida---not the Defendant American in this action) ultimately led to the FHLBB's participation in securities fraud in an attempt to mitigate financial damage to the institution. The inherit conflict between financial regulation and securities law enforcement is vividly

demonstrated by the FHLBB's actions when the agency determined that American was controlled by unfit management."

(f) page 19, paragraph 2,"Accounting Gimmicks."

"The FHLBB's claim that it applies the same accounting and enforcement rules as the SEC was disproved many times during the Subcommittee's hearings. For example, the FHLBB has extensively used special regulatory accounting principals, not recognized by the SEC, to substantially inflate the reported net worth of individual savings and loan associations and the industry as a whole. In just four years, the FHLBB's use of these special rules caused a portion of regulatory net worth of the of the savings and loan industry which is attributable to "good will" and other

intangible assets of little or no value to grow from one percent to more than seventy percent."

(g) page 29, paragraph 1, "The FHLBB has demonstrated clearly that it cannot or will not enforce the Federal securities laws as intended by congress."

99. Plaintiff calls attention to this study to lend weight to his allegations that the FHLBB and Defendants used improper schemes in their dealings with FCA, American and their subsidiaries and has placed itself and its interests in protecting itself and its insurance arm FSLIC, in an imperial and superior position to that of other important public interests overseen by the Securities and Exchange Commission, a sister regulatory body, who are charged with an equal duty to protect a public

interest and also have a public duty and trust.

Plaintiff respectfully suggests to the court that the FHLBB has committed gross regulatory negligence in violation of its charter and high position of trust and has shown in the past and in this matter before the court that it is willing to violate securities laws in an imperious manner, and enter into schemes causing great harm to the public shareholders, who may be powerless against it due to its favored presumption of legitimacy under federal law.

[END EXCERPTS FROM PETITIONER's COMPLAINT REFERRING TO "EXHIBIT D"]



STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code

Title 15

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so

registered, any manipulative or deceptive device or contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Code of Federal Regulations

Title 17

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of

any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or,

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Federal Rules of Civil Procedure

Rule 56 Summary Judgment

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

NO. 92-83
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

JOHN D. TURNER,

Petitioner,

v.

FINANCIAL CORPORATION OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Pro se petitioner John D. Turner ("Turner") filed a securities fraud suit arising out of his purchase of 90,000 shares of Financial Corporation of America ("FCA") common stock ("Stock"). The Stock was purchased by Turner at progressively lower prices from April 1986 through April 1987 at a cost of $816,125. FCA Stock continued to drop in price, and Turner ultimately brought suit. The United States District Court for the Northern District of California granted summary judgment for defendants on the grounds that the risky nature of FCA Stock was well disclosed in its 10-K filings and the media, and that Turner did not rely on any alleged misrepresentations or omissions when purchasing FCA Stock. The Ninth Circuit affirmed in an unreported decision.

In this context, Turner's issues for review are fairly summarized as follows:

1. Did the Ninth Circuit err in its

determination of whether alleged misrepresentations and omissions were "material" by considering the total mix of publicly available information, including media stories identifying the speculative nature of the FCA Stock?

2. Did the Ninth Circuit err by ruling that Turner could not establish the reliance element of his securities fraud claim where the undisputed facts showed that Turner performed his own financial analysis, followed the FCA Stock closely, and knew of FCA's financial problems?

The third issue raised by Turner in his petition is a restatement of the first issue.

STATEMENT OF INTERESTED PARTIES

Turner's list of parties incorrectly includes Thomas P. Kemp and Charles E. Young. These parties were excluded from Turner's notice of appeal to the Ninth Circuit, and accordingly the trial court judgment in their favor is final. The Federal Deposit Insurance Corporation is also an interested party.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

NO. 92-83

JOHN D. TURNER,

Petitioner,

v.

FINANCIAL CORPORATION OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents William J. Popejoy, Victor H. Indiek, Merril Butler, Donald E. Royer, Neil N. Stolz, J. Ralph Stone, Robert M. Barton, Annelise G. Anderson, Edwin L. Johnson, Lawrence K. Roos and KPMG Peat Marwick respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's decision in this case.

OPINIONS AND ORDERS BELOW

The February 21, 1992 unreported decision of the United States Court of

Appeals for the Ninth Circuit affirming the summary judgment in favor of respondents is reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-21a. The June 1, 1990 Amended Memorandum and Order of District Court granting summary judgment in favor of respondents is unreported and reproduced in Pet. App. at 25a-51a.

JURISDICTION

The Court of Appeals entered judgment on February 21, 1992. Pet. App. at 23a-24a. Petitioner's petition for rehearing was denied on April 1, 1992. Pet. App. at 22a. The petition for writ of certiorari was initially served on June 19, 1992, and rejected for non-compliance with the Rules of the Supreme Court of the United States. A subsequent petition for writ of certiorari was served on July 6, 1992, seeking to invoke the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule § 240.10b-5 promulgated thereunder are reproduced in Pet. App. at 235a-237a. Federal Rule of Civil Procedure 56 and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, are reproduced in Respondents' Appendix at 1a-3a, infra.

STATEMENT OF THE CASE

A. Introduction.

This suit arises out of Turner's unsuccessful investment in FCA Stock. Turner purchased 90,000 shares of FCA Stock for $816,125 at progressively lower prices during a one year period from April 1986 through April 1987. Turner seeks to invoke the federal securities laws to recover that sum from virtually all persons associated with FCA during his one-year buying binge, including certain officers and directors, as well as FCA's auditors. The District

Court dismissed his claims pursuant to Fed. R. Civ. P. 56, finding that Turner was well aware of the risks associated with his purchases. The Ninth Circuit, after a thorough review of the record, affirmed.

FCA, and its wholly-owned subsidiary American Savings and Loan Association ("American"), were much in the news two years prior to Turner's initial April, 1986 Stock purchase. Following a Securities Exchange Commission investigation, FCA was forced to restate its income at June 30, 1984 from a $75.3 million gain to a $79.9 million loss. A subsequent loss of investor confidence in American resulted in a run on deposits of approximately $6.8 billion. The Stock price fell from a January 1984 high of $24 1/4 to a low of $5 1/8 in August 1984. The management of American, led by Charles Knapp, resigned in August 1984 following allegations of unsafe banking practices. Defendant Popejoy began

as Chief Executive Officer on August 28, 1984.

Turner, a mortgage broker with thirty years of experience in the real estate industry, initially purchased 5,000 shares of FCA Stock on April 23, 1986 at prices of $12 3/8 and $12 3/4 per share. Prior to that initial purchase, Turner reviewed the 1985 10-K which disclosed the following financial problems of FCA:

1. loan loss reserves were increased by $422 million as of December 31, 1984;

2. loan loss reserves were increased by $182 million as of December 31, 1985;

3. the investigation of the loan portfolio was on-going; and

4. FCA was being sued in various shareholder class action suits arising out of the activities of the Knapp management which had been tentatively settled in the range of $32.0 - $42.7 million.

Pet. App. at 13a-14a.

As a part of his decision to purchase additional FCA Stock, Turner subscribed to

various stock reporting services. These services studied by Turner, candidly apprised him of the "risky" nature of the FCA Stock. Pet. App. at 212a, May 16, 1986 Valueline Article, ("These shares are risky . . . so these extremely volatile shares warrants [sic] a cautious approach even though they're ranked highly for timeliness.") Turner considered the FCA Stock to be undervalued, based upon his own financial analysis. Turner, in fact, candidly admitted at his deposition, that his investment in FCA was "highly risky or speculative." Pet. App. at 41a-42a. As is often the case with such "highly speculative investments," the potential high return was not realized. Turner now seeks to invoke this Court's jurisdiction in an attempt to recoup through litigation the losses that he unquestionably understood might result when he purchased the FCA Stock.

B. Proceedings Below.

Turner initially filed this action on April 21, 1988. Based on Turner's representations that he expected to be represented by counsel, the parties stipulated to a dismissal of his suit without prejudice. Turner then filed his 70-page amended complaint, which was a rambling and disconnected tirade against the savings and loan industry generally, and FCA particularly. Defendants subsequently filed motions to dismiss the amended complaint pursuant to Fed. R. Civ. P. 8, 9(b), and 12(b)(6).

On September 18, 1989, the District Court, in an effort to accommodate a pro se litigant and to more efficiently manage the court's time and resources, ordered that Defendants' motions to dismiss be held in abeyance. The trial court concluded "the best way to get to the heart of this case . . . is to have you [the Defendants] take the plaintiff's deposition and pin

down exactly what representations he does claim he relied on and get the kind of specificity that is necessary." Respondents' App. at 8a. Although the trial court was disposed to dismiss Turner's amended complaint, a more equitable and efficient procedure was followed:

> . . . now you know what the Ninth Circuit would do if I dismissed any of the claims without leave to amend and instructions as how to do it right since Mr. Turner is representing himself. I'm not sure, with all due respect to Mr. Turner, what we are going to get when we get it back . . . .
>
> Because if I had to deal with a motion to dismiss, I would have to dismiss and strike a significant part of it and give you leave to amend, and we would be back here again. I think this advances us much more quickly on where we need to go.

Respondents' App. at 8a-10a.

Turner was deposed during the week of November 9, 1989, after producing his files totalling over 7500 pages concerning FCA. On December 18, 1989, Defendants filed

motions for summary judgment, on the grounds that Turner's testimony made it clear that his claims were not actionable as a matter of law. As part of the motion, a detailed statement of undisputed facts was filed based upon Turner's own deposition testimony and the numerous documents he produced from his FCA file. By amended order on June 1, 1990, the trial court granted Defendants' motions for summary judgment. The Ninth Circuit affirmed in an unpublished decision dated February 21, 1992.

SUMMARY OF ARGUMENT

The Ninth Circuit's affirmance of summary judgment against Turner was premised upon the standards for materiality set forth by this Court in Basic, Inc. v. Levinson, 485 U.S. 224 (1988) and Virginia Bankshares, Inc. v. Sandberg, ____ U.S. ____, 111 S. Ct. 2749 (1991). The Ninth Circuit's adherence to these cases is in

accord with decisions of other federal courts of appeals.

Turner incorrectly asserts that the Ninth Circuit's reliance on the "fraud on the market theory" was contrary to the decisions of the eight courts of appeal [sic] to address the issue. Pet., at 28. In fact, the Ninth Circuit's decision is not premised upon the "fraud on the market" theory. Instead, the decision is based upon the established principles of materiality and reliance as applied to the specifics of Turner's own knowledge about the FCA Stock. There is no conflict among the circuits that would warrant the invocation of this Court's jurisdiction.

The Ninth Circuit painstakingly reviewed the record in this case, concluding that even if knowingly false statements were made, Turner could not establish the reliance element of his claim. Pet. App. at 9a. The Ninth Circuit properly noted that prior to Turner's

purchases "the [news]papers were filled with news of FCA's financial difficulties and its previous unsound lending practices." Id., at 10a-11a. Specifically, in 1985, the New York Times called FCA 'the most explosive, speculative stock on the New York Exchange'". Id. The American Banker stated in its September 22, 1986 article that "the company is out of danger, but still about three years away from being financially sound . . . potential decreases in real estate values, however, could still result in increased reserves in the fourth quarter." Id., at 11a. Business Week's March 10, 1986 article, published shortly before Turner's initial purchases, referred to FCA as "Financial Corpse of America" and quoted FCA President William J. Popejoy as stating "I hope expectations aren't getting too high." Id., at 11a-12a. Under the well established standards for materiality, the Ninth Circuit properly ruled that no

10b-5 liability exists where the total mix of negative information available about the stock is widely disseminated.

Furthermore, the Ninth Circuit properly applied the standards for reliance when ruling that even if material misstatements or omissions existed, Turner's own deposition testimony precluded any finding of reliance. Pet. App. at 13a. Turner performed his own detailed financial analysis using Lotus 1-2-3 spreadsheets, and subscribed to several stock reporting services which gave FCA the lowest safety rating as a "risky" investment. Pet. App. at 12a-13a. Furthermore, Turner admitted that one of the reasons he purchased the FCA Stock was because American was a potential buy-out candidate. The judgment in favor of respondents on the basis that Turner could not establish the reliance element of his claim is well supported.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's decision is premised upon the standards for summary judgment articulated in In re Apple Computer Securities Litigation, 866 F.2d 1109 (9th Cir. 1989), cert. den. 496 U.S. 942 (1990). Turner cites no circuit court decision in conflict. The Ninth Circuit further relied on this Court's decisions in Basic, Inc., supra, and Virginia Bankshares, Inc., supra, for the standard of when an omission or misrepresentation, respectively, is "material" for purposes of a 10b-5 claim. Finally, the Ninth Circuit's de novo review of the record resulted in the proper conclusion that Turner could not establish the reliance element of his claim due to the broadly disseminated information about the risks of the FCA Stock and Turner's admitted knowledge of those risks.

1. The Ninth Circuit Properly Applied the Standard For Summary Judgment.

The Ninth Circuit reviewed the summary judgment de novo, relying upon In re Apple Computer Securities Litigation, 866 F.2d at 1112. The Ninth Circuit further relied upon In re Apple Computer Securities Litigation for the proposition that a plaintiff must prove "materiality" and "reliance" to prevail on a 10b-5 claim. Pet. App. at 5a-6a. The Ninth Circuit, quoting that decision, ruled that summary judgment for defendants is proper 'where there can be but one reasonable conclusion' as to "materiality" or "reliance." Pet. App. at 6a; In re Apple Computer Securities Litigation, 886 F.2d at 1112-13. Turner has cited no circuit court decision in conflict with these principles, nor are respondents aware of any such authority.

2. The Ninth Circuit Properly Applied The Standards For Materiality of and Reliance on Alleged Misrepresentations.

Turner's primary claim concerning a misrepresentation by defendants was that American President William Popejoy was overly optimistic about American, stating "we're out of harm's way." Pet. App. at 6a-7a. The Ninth Circuit quoted Virginia Bankshares, Inc., 111 S.Ct. at 2760, for the test for whether an alleged misrepresentation was material:[1/]

> "Not every mixture with the true will neutralize the deceptive. If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading

---

1/ Virginia Bankshares, Inc. involved a claim under Section 14 of the 1934 Act. The Ninth Circuit applied that materiality standard to this 10b-5 action, citing Basic, Inc. where this Court held that the materiality elements of Section 14 and 10b-5 claims were identical. Consistent with the Ninth Circuit, one District Court in a published decision applied the Virginia Bankshares, Inc. materiality standard to a 10b-5 claim. See In re Meridian Securities Litigation, 772 F. Supp. 223, 226 n. 3 (E.D. Pa. 1991).

> will remain materially so, and liability should follow."

Pet. App. at 8a. The Ninth Circuit faithfully applied this test and concluded that the alleged misrepresentations by Mr. Popejoy were not "material."

The Ninth Circuit further ruled that, even if the statements were knowingly false:

> "Turner's claim fails because he was exposed to such a morass of contrary information that it was not reasonable for him to rely solely upon Popejoy's optimistic statements as evidence that all the other available information was inaccurate . . . "

Pet. App. at 9a. Again, the Ninth Circuit followed this Court's teaching. Specifically, the Ninth Circuit relied upon Basic, Inc. for the proposition that "reliance requires demonstration of a causal connection between a defendant's misrepresentation and a plaintiff's injury." Pet. App. at 9a. Although reliance on publicly available information is presumed, that presumption is rebutted by "any showing that severs the link

between the alleged misrepresentation . . . and his decision to trade at a fair market price." Pet. App. at 10a. Based upon the myriad of negative information about American in the media and in American's disclosures, the Ninth Circuit properly concluded that "the causal connection between Popejoy's statements and Turner's purchases and losses is missing in this case." Pet. App. at 10a; see also supra, at 6, referencing various news articles that disclose the precarious financial condition of American. That decision is amply supported by the factual record, and does not merit this Court's review.

3. The Ninth Circuit Properly Applied The Standards For Materiality of and Reliance on Alleged Omissions.

The Ninth Circuit identified Turner's primary claim concerning omissions: FCA failed to disclose the inadequacy of the loan loss reserves for American. This

claim, however, was properly dismissed based upon the following undisputed facts:

> 1. The 1985 10-K disclosed the increase of loan loss reserves by $422 million in 1984 and $182 million in 1985;
>
> 2. The 1985 10-K disclosed that FCA was still reviewing the loan portfolio; and
>
> 3. The media reported that the loan loss reserves were expected to be raised.

Pet. App. at 14a. Furthermore, Turner testified at his deposition that he was unable to "point to something" in the 1985 10-K and "say it was a misstatement." Id.

Turner's additional claims of omissions were also properly dismissed.[2/] Although

---

2/ Turner also claimed that FCA did not disclose that American was a takeover candidate. This was well documented in the press, known by Turner, and actually one of the reasons he purchased the stock. Pet. App. at 17a. Turner also claimed at the trial court level that FCA did not disclose that the unqualified audit opinion was premised upon a letter of support from the Federal Home Loan Bank Board. The

(continued to next page)

Turner was correct that a Proof of Loss statement filed by the company with its insurance carrier was not disclosed, the fact of the problem loans dealt with in the Proof of Loss was widely disclosed. Pet. App. at 15a. Furthermore, Turner at deposition could not identify anything in the Proof of Loss, in terms of "financially, numbers, dollars and cents" that was not reported in the 1985 10-K. Id. These alleged "omissions" concerned information broadly disclosed to the market, and accordingly cannot form the basis of a securities fraud claim. In any event, they raise no questions for this Court to review.

(continued from previous page)

2/ Ninth Circuit properly ruled that the letter of support was reprinted in full in the 1985 10-K. Pet. App. at 18a. The fact that the unqualified audit opinion was premised upon the letter of support was also reported by the Wall Street Journal three weeks prior to Turner's initial purchase of FCA Stock. Pet. App. at 116a-117a.

4. The Ninth Circuit's Decision Is Not Premised Upon A Fraud on the Market Theory.

Turner asserts that the District Court, and presumably the Ninth Circuit, erred by using the "fraud on the market" theory "for the sole purpose of holding Turner constructively on notice of selected negative information." Pet. at 31-32. Turner's argument confuses the test for "materiality" with the "reliance" element of a 10b-5 claim.

Initially, the "fraud on the market" theory establishes under certain circumstances a rebuttable presumption that a plaintiff in a 10b-5 action relied on a misstatement determined to be "material." Such reliance on a material misstatement is presumed based on the rationale that the stock purchaser indirectly relied on the alleged misstatement by relying on the integrity of the stock price established by the market. In re Apple 886 F.2d at 1113-14, citing Blackie v. Barrack, 524

F. 2d 891, 906 (1975), cert. den. 429 U.S. 816 (1976).

The Ninth Circuit's reference to the negative information about FCA disclosed to the market concerned the test for "materiality." That test, as articulated in Basic, Inc., supra, Virginia Bankshares, Inc., supra, weighs the alleged misrepresentation or omission against the information already publicly disclosed to determine "materiality." This is distinct from the "fraud on the market" theory, which involves the reliance element of a 10b-5 claim after a showing of "materiality" is made. Furthermore, the Ninth Circuit specifically found that even if the presumption of reliance was applicable, "the causal connection between Popejoy's statement and Turner's purchases and losses is missing in this case." Pet. App. at 10a. Their analysis adhered to settled principles and presents no issue worthy of review.

CONCLUSION

The principal issues presented for consideration by Turner's petition for a writ of certiorari concern well established principles of "materiality" and "reliance" set forth by this Court in Basic, Inc., supra, and Virginia Bankshares, Inc., supra. The Ninth Circuit's application of these principles to the facts surrounding Turner's stock purchases should not be disturbed, or even accepted for consideration. For these reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

The pertinent statutory provisions which were not reproduced in the Pet. App. are Federal Rule of Civil Procedure 56 and Section 1961 of the Racketeer Influenced and Corrupt Organization Act ("RICO"). Pertinent excerpts from the District Court's hearing are also reproduced.

Federal Rule of Civil Procedure 56 provides in full:

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers of interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entiled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed

established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or

depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may adjudged guilty of contempt.

Section 1961 of RICO subsections (1), (4), and (5) provide:

(1) "racketeering activity" means (A) any act or threat involving murder kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and

welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to

interstate transportation of stolen motor vehicle), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffice), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

. . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of

which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . . .

The pertinent provisions from the reporter's transcript from the United States District Court, appearing respectively at p. 11:3-12:24 and p. 20:2-11, are as follows:

> The Court: Let me tell you what I think ought to happen. I am going to do something a little unusual in this case.
>
> Even with firms like Millberg Weiss, and so forth, representing plaintiffs in cases like this it sometimes seems like it takes forever to get through the pleadings stage.
>
> We have a myriad of defense motions, and we have motions -- then, of course, particularly now you know what the Ninth Circuit would do if I dismissed any of the claims without leave to amend and instructions as to how to do it right since Mr. Turner is representing himself.
>
> I'm not sure, with all due respect to Mr. Turner, what we are going to get when we get it back, because there are some things that are allegations that relate to what is puffery and there are other things that is [sic] allowed.
>
> I mean, somebody stands on the top -- I don't know -- of half dome, or whatever, and says: We are solid as this. I think you can sue Prudential. When they also stand on the rock and if something happens

and they sink a little bit -- those are the sort of generalized, say, puffery statements for which you can't recover.

There are, however, specific either omissions or misrepresentations that, if you relied upon them, one can recover. And I think probably the best way to get to the heart of this case and the soonest, most expeditious is to have you take the plaintiff's deposition and pin down exactly what representations he does claim he relied on and get the kind of specificity that is necessary.

Find out whether his reliance was reasonable, and all of those other good things that you need to know in order to know if there are valid claims here. And then come back here with motions that really, I guess, should be recharacterized as motions for summary judgment.

In other words, let's just get out of this pleadings phase, another round of motions to dismiss which I envision down the road. Find out what he has to say at a deposition, and make your motion for summary judgment as appropriate. And let's really pin this case down and see what it looks like.

How long will it take for you to depose him and to set a deposition? And let's not make it a marathon deposition, but I know that it is going to take some time. I don't know how straight on Mr. Turner will answer your questions. But also there are a lot of allegations here.

But it is a lot easier, I think, for you to pinpoint them in a deposition than it is to do this through pleading practice.

How long will it take you?

. . . .

And if, in fact, I am satisfied there is additional discovery that you need in order to respond, I won't decide those aspects of the motion until you get the discovery.

Okay. But this is really -- it's to narrow down what the claims are in this case and figure out exactly what they are.

Because if I had to deal with a motion to dismiss, I would have to dismiss and strike a significant part of it and give you leave to amend, and we would be back here again.

I think this advances us much more quickly on where we need to go. Okay, counsel. Any questions?

Supreme Court, U.S.
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No. 92-83

In The

Supreme Court of the United States

October Term, 1992

JOHN D. TURNER

Petitioner,

v.

FINANCIAL CORPORATION OF AMERICA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER TO RESPONDENTS' JOINT BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Ninth Circuit rubber-stamped the District Court's incorrect arbitrary identification of Turner's primary complaint as Popejoy's optimistic statements and FCA's failure to have sufficient reserves for losses.

These are only subsets of their 10b-5 violations. They omitted material facts and filed materially misleading statements with the SEC about the condition of their loan receivable assets. They also withheld that they were in receipt of secret indemnification agreements issued by the Federal Home Loan Bank Board. Turner relied on information published or omitted by FCA in their 10-K's, 10-Q's, and their official press releases. Popejoy's statements were a part of that total mix.

The Ninth Circuit decision in this case fails to embody this court's principals and their standard would grant a license to violate securities reporting requirements by filing false and misleading SEC reports with immunity to securities law as long as there is enough controversy about a company published in the media.

Basic, Inc. v. Levinson, 485 U.S. 224 (1988) and *In re Apple Computer Securities Litigation,* 866 F.2d at 1109, are class action cases. Their standards and principals ill fit the facts of an individual trading in the market relying upon 10-K, 10-Q and official company press releases to make his investment decisions.

In developing their erroneous legal concept of materiality and omissions in this case the Ninth Circuit wrongly applied these class action principals.

Turner made his investment decisions relying upon FCA's reported information and their omissions, in SEC required format, which Congress intended that he be legally entitled to rely upon.

ANSWER TO RESPONDENTS' REASONS FOR DENYING THE PETITION ARGUMENT

1. The In Re Apple Computer Securities Litigation Argument.

In *Apple* the dispute centered around a product which had received quality control, premarket testing, etc. Further the

officers all filed affidavits of their good faith belief in the statements they made about the product.

In striking contrast in this case the FCA officers and directors were informed from the fourth quarter of 1984 through November of 1985 as to the improvident nature of their product, that a significant portion of their assets had been generated in a general course of fraud and none of the respondents, including spokesman Popejoy, filed affidavits of their good faith and belief in the statements they made or approved in company press releases, and 10-Q and 10-K statements.

They also withheld from Petitioner that they had received indemnification agreements issued by FHLBB Resolutions to reimburse them for any financial losses suffered as directors and officers of FCA/American. (App. 163a-176a; 198a)

Under Popejoy's management, FCA spoke out steadily about their exhaustive task force investigation of their loan portfolio assets and the reasons for loan loss provision increases.

While an affirmative duty to disclose exists only in limited circumstances, once an affirmative disclosure is voluntarily made, a duty arises to tell the entire truth about the subject of the disclosure. If a corporation chooses to speak voluntarily, its statements must be truthful and complete in all material respects. A standard this court has clearly upheld in *Greenfield v. Heublein, Inc.*, 742 F.2d 751, 758 (3d Cir. 1984), cert. denied, ___ U.S. ___ 105 S. Ct. 1189 (1985); *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 861-2 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). Or as another court stated more simply, "[A] duty to speak the full truth arises when a defendant undertakes to say anything." *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1317 (5th Cir. 1977), cert. denied 435 U.S. 952 (1978).

FCA was secretly insolvent when Popejoy took over in September 1984. FCA's loan portfolio of "improvident loans" caused the company to be insolvent at all times. After their discovery (between the fourth quarter of 1984 through November 1985), by the new Popejoy management, FCA was

required to report this material fact. Any press speculations about the risky nature of FCA having a portfolio with a high number of fixed rate loans or loans in economically troubled oil patch states certainly is not credible evidence of FCA's true loan portfolio problems. (App. 92a-142a)

2. The Ninth Circuit Did Not Properly Apply the Standard For Summary Judgment.

The Ninth Circuit's *de novo* review was severely deficit as shown in Petitioner Turner's "Petition for Rehearing" (App. 54a-74a). Rehearing was denied – but in a split vote. (App. 22a)

3. Answer to Respondents Assertion that The Ninth Circuit Properly Applied the Standard For Summary Judgment relying on the *In re Apple* proposition that a plaintiff must prove "materiality and reliance" to prevail on a 10b-5 claim.

The Ninth Circuit arrived at its conclusions regarding "materiality" and "reliance" based upon holding Turner constructively on notice of the content of media stories. These publications submitted by respondents comprised soft information which could reasonably be interpreted differently than the lower court's interpretation. So that there was more than "one reasonable conclusion". And clearly a far different set of facts than those contained in *In re Apple Litigation.*

Applying the standard the Ninth Circuit held *In Re Apple Computer Securities Litigation,* 886 F.2d at 1114:

> "Ordinarily, omissions by corporate insiders are not rendered immaterial by the fact that the omitted facts are otherwise available to the public. [citations omitted]. Where a plaintiff alleges actual reliance on a particular statement, it does not matter that the market is aware of the facts necessary to make the statement not misleading. The plaintiff may be misled into believing that the stock has been incorrectly valued by the market."

Also the Ninth Circuit held in *In Re Apple Securities Litigation* (at 1116, [7]):

> "Even in a fraud on the market case, corporate insiders are not relieved of their duty to disclose material information where that information has received only brief mention in a few poorly-circulated or lightly-regarded publications. The investing public justifiably places heavy reliance on the statements and opinions of corporate insiders. In order to avoid Rule 10b-5 liability, any material information which insiders fail to disclose must be transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by insiders' one-sided representations."

That standard has not been met in this case because the press was unaware of the existence of the fraud outlined in the proof of loss, the improvident loans it generated, or their extent and condition.

The dramatic rise in FCA's stock prices to $17.25 over the next 16 months after Knapp resigned and Popejoy took over provide a strong indication that FCA's new management was making statements that were material in that the stock price quadrupled. And as the Ninth Circuit held in *In Re Apple Securities Litigation*, at 1116 [8], even in a fraud upon the market class action case:

> "An entirely plausible explanation would be that the market was persuaded by Apple's optimism notwithstanding the known risks. In that case, the optimistic statement could still result in liability if the statement was not genuinely believed, or if that belief lacked a reasonable basis."

One could easily replace the name "Apple's" with "FCA's" in the above statement of the Ninth Circuit Court.

Then when weighed by the information contained in: 1) The "Proof Of Loss" (App. 163a); 2) The "Indemnification Agreements between the Directors and the FHLBB" (App. 198a); 3) The sworn testimony of M. Danny Wall before the House Banking Committee (App. 195a-197a); 4) The Peer Review report of the SF-FHLB. (App. 191a-194a)

The question of fact for a jury immediately becomes whether there was any reasonable basis for their optimistic statements about FCA's recovery. And whether genuinely believed by them when they were made.

So the class action standards used by the courts below to rationalize away the materiality to Turner of an undisclosed portfolio of fraudulently generated improvident loans and assets, (created as a normal course of business), are not standards supported in *In re Apple* as they claim.

4. Respondents Claim the Ninth Circuit Properly Identified Petitioner Turner's Primary Claims Concerning Misrepresentation and Omission as Popejoy Being Overly Optimistic about American; and that FCA Failed to Disclose the Inadequacy of the Loan Loss Reserves for American.

This is patently false. Turner's primary claim is that Respondents Popejoy, and the officer/director defendants:

1). Discovered, and did not disclose, more than a year before Turner began to purchase (during the period between the fourth quarter of 1984 and November, 1985) that FCA's assets were generated through a general practice of fraud, were improvident, and not only likely to cause the company continuing losses, but were in fact causing continuing losses. Rather than report this material information to the shareholders, the SEC and the market, they sought and received indemnification by the FHLBB for any losses they might sustain by serving as officers and directors of FCA/American. (App. 163a-176a; App. 198a)

2). The FHLBB passed at least one resolution granting indemnification, and there is evidence that prior to the 1988 shareholders' meeting others may have been passed. (App. 198a)

So rather than service as loyal fiduciaries to the shareholders the respondents served as fiduciaries with divided loyalties which were not reported to petitioner so that he could be on guard against their statements about the financial condition of the company.

These hard facts were material information that any reasonable speculator or investor would need in order to make an informed investment decision about whether FCA/American was

indeed recovering, or could recover, as Popejoy claimed; had the assets of $320 million it reported in its second quarter 10-Q as late as June 30th, 1987, or in fact had a negative net worth and was expected to cost the FSLIC $4 billion dollars as stated in the SF-FHLB files.

The test respondents claim the Ninth Circuit faithfully applied was no test of the correct claim and position of Turner at all. And even the wrong test applied to the wrong proposition wrongly held Turner constructively on notice of "a morass of contrary information" which was allegedly reported in publications Turner did not even read, were published in many instances before he even began to invest, and most certainly were comprised of soft information subject to more than one reasonable conclusion.

The Ninth Circuit Panel errs when considering and weighing the total mix of publicly available information, including media stories identifying the speculative nature of FCA stock.

5. Respondents Claim The Ninth Circuit found that the risky nature of FCA Stock well disclosed in its 10-K filings and in the media.

Every stock has a speculative nature of some degree. That FCA stock had a speculative nature is not a defense to securities fraud. That FCA was risky is not the point at all. The question is whether every material risk was disclosed.

The degree of risk, whether 1% or 99% does not grant a license under securities law, or excuse respondents from reporting the material facts they discovered. Especially when they spoke out quarterly giving other reasons for losses they were setting aside the loan loss reserves to cover.

This "risky nature" non-argument certainly does not grant respondents the right to withhold hard material facts that would have warned any reasonable person that FCA's assets were phantom assets generated through a general practice of fraud, or that its directors and officers had divided loyalties between the shareholders, the Savings and Loan Industry and the FHLBB.

The facts of this case make it clear that the FHLBB did not want the market or the investor to know the true financial condition of FCA or its subsidiary S&L American Savings.

Petitioner presented probative evidence of a motive, opportunity and a history of the same kinds of violations of securities law by the FHLBB while it incompetently attempted to deal with the fraud and abuse they were discovering within the industry they were obligated to regulate. (App. 229a-234a)

With respect to Respondents' claim that the Ninth Circuit properly found that reporting provisions for loan loss of $422 million in 1984 (two years before Turner's first purchase) and $182 million in 1985 adequately disclosed the discoveries set forth in the proof of loss, or at least the financial impact of the proof of loss disclosures.

Not all of the Ninth Circuit Panel agreed as Judge Noonan (JN) pointed out in this oral argument interchange. Attorney Peter Thurston (PT) argued as proof of detailed disclosure that the 1985 10-K disclosed FCA had to restate its income in 1984 from a gain of $75 million to a loss of $75 million.

JN: Mr. Thurston I'm looking at Judge Patel's Opinion in which she says that the details of the Knapp management misdeeds were well documented in various financial periodicals as well as in FCA's 10-K report. Now were they well documented in the 10-K report?

PT: Yes! I don' think . . .

JN: Would you point to that please?

PT: Yes! the 10-K report noted that in 1984 . . .

JN: Which 10-K is this?

PT: This is the December 31, 1985 10-K tells you that in 1984 they went from a stated profit in July of a positive $74 million to being seized by the FHLBB and to restating their loans to a $75 million dollar loss. Now I don't think that a rational reasonable investor knowing this Mr. Turner was fully conversant with this he knew that Mr.

Knapp had been ousted he knew that they had to restate their earnings from a $75 million profit to a $75 million dollar loss a $150 million dollar swing in less than six months he knew that and for him to say but I had no notion that Knapp or those people who had those kinds of loans were doing anything untoward that they were making improvident loans.

JN: Well it certainly reflects a change in the balance sheet but does that 10-K say financial misdeeds he was fraudulent here he was fraudulent there.

PT: The 10-K states that Mr. Knapp and his officers and directors were removed and replaced by were replaced by Mr. Popejoy in September of 1984 by the FHLBB.

JN: For Fraud?

PT: They didn't say fraud. I don't think there was any indication there was fraud.

JN: No I'm talking about Judge Patel somehow finding a detailed statement of financial misdeeds.

PT: Sir but the difficulty I'm having is that your characterizing the conduct of the Knapp people as fraudulent.

JN: No I just wanted to see how sound her opinion was and she says there was a well documented detailed statement of financial misdeeds in the 10-K. Now you haven't told me about that!

PT: I've told you historically what happened . . .

JN: You've told me there was a shift in the balance.

PT: I've told you that there was a restatement of a 150 million dollars and a removal of the FHLBB management.

JN: But is that a detailed statement of financial misdeeds?

PT: I don't . . . I think it gives you a pretty good indication of what was going on I think that anyone who ignores that is saying that I'm going to lose my eyes and go ahead . . .

> JN: I don't know why you think that because many banks as well as savings and loans made bets on real estate that turned sour and had to restate their profits. Its very different in making a mistake as to what the financial condition of the area will be to doing something fraudulent.

Having loans in the Texas Oil Patch, Rust Belt, and other States where economic conditions went sour, and a large number of fixed rate loans, was the 10-K risk disclosed in April 1986 when Petitioner began to purchase FCA common. A far different risk from disclosing that there was a whole course of fraudulent lending practices which caused the company to have a significant number of phantom assets being carried upon their books as though they were real assets.

Also in this interchange Respondents' attorney made several incorrect statements. The 1985 10-K stated that FCA's 1984 restatement of earnings was due to a SEC forced restatement of FCA's reported income derived from "Dollar Roll Reversal" transactions. Which was counting income derived from successful trading in mortgage backed securities while deferring losses incurred by poorly timed trades. Nothing at all to do with FCA or American's fraudulently generating assets and its real estate loan portfolio.

Furthermore neither 1985 10-K nor any following 10-Q or 10-K, nor any FCA Press Release, states, infers or reveals, that the FHLBB removed the Knapp Management.

6. Respondents Confuse Turner's Fraud On the Market Argument.

Turner does allege that there was a fraud upon the market in his complaint as well as a fraud upon him, as an investor relying upon the company's 10-K, 10-Q and Official Press Releases. He shows, in his petition to this court, by the logic behind the fraud upon the market theory that the evidence supports that the market was also misled by FCA's 10-K and 10-Q reports and their steady stream of press releases.

Their ad hominem attacks require an isolated investor. The logic behind the legally established Fraud on the Market

Theory makes it difficult to isolate Turner from the comparable actions and decisions of other investors and the market's action.

7. The Ninth Circuit Erred by Ruling That Turner Could Not Establish the Reliance Element of His Securities Fraud Claim Where the Undisputed Facts Showed that Turner Performed His Own Financial Analysis, Followed The Stock Closely, and Knew of FCA's Financial Problems.

First) The facts clearly show that neither Turner (nor the market) knew of FCA's true financial problems.

Second) Petitioner Turner used a calculator to add/subtract/multiply and divide numbers provided him in a 10-K or 10-Q form. He used a modern math program called Lotus 123 (which is a general software spreadsheet adaptable to may forms of math functions) and a computer to do the calculation.

Surely he is not then prohibited from bringing an action if the information he relied on about FCA's assets (which in turn led him to believe there was a recovery in place and to evaluate the branches when FCA met its recovery target) omitted and was missing material facts.

The Ninth Circuit improperly applied this Courts standards set in *Basic, Inc., supra* and *Virginia Bankshares, Inc.*, and in their own decision in *In re Apple Securities Litigation, supra* – establishing legal principals which make bad law with disastrous financial consequences to an investor seeking protection guaranteed him by Acts of Congress.

CONCLUSION

For these foregoing reasons Turner's petition should be granted.

Respectfully submitted,

JOHN D. TURNER
Petitioner

DATED: September 10, 1992